93-464

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

G-K DEVELOPMENT COMPANY, INC.,

Petitioner,

vs.

BROADMOOR PLACE INVESTMENTS, L.P., et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Bankruptcy Reform Act of 1978:

1. Are there appellate mootness exceptions to a sale of a debtor's asset under 11 U.S.C. 363(m) where a stay order is not issued?

2. Is good-faith-purchaser status under 11 U.S.C. 363(m) for the sale of a debtor's real property determined by state law?

3. Does a bankruptcy court have jurisdiction to select from competing contracts for the purchase of a debtor's asset?

4. Is a purchaser to a sales contract with a debtor entitled to notice under Bankruptcy Rule 2002(c)(1) that includes a disclosure of all parties to the transaction being presented to the bankruptcy court?

5. Does a bankruptcy court have jurisdiction to modify an order on appeal to the district court?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were:

1. Petitioner: G-K Development Company, Inc., a Kansas corporation*; and

2. Respondents: Broadmoor Place Investments, L.P., a Kansas limited partnership; Forrest L. Robinson; Blue Valley Federal Savings & Loan; Resolution Trust Corporation as Receiver for Blue Valley Federal Savings & Loan; and the United States Trustee.

* Pursuant to Supreme Court Rule 29.1, there is no parent or subsidiary company.

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vs.

BROADMOOR PLACE INVESTMENTS, L.P., et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 21, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals denying Petitioner's Motion for Rehearing and Suggestions for Rehearing en Banc dated June 17, 1993, is set forth in Appendix 1. The Judgments of

the United States Court of Appeals for the Tenth Circuit were entered on May 21, 1993, and are set forth in Appendices 2 and 3. The Opinion of the Tenth Circuit Court of Appeals dated May 21, 1993, is reported at 994 F.2d 744 and is set forth in Appendix 4. The unreported Order of the District Court which dismissed the appeal of the Bankruptcy Court Order as moot in Case No. 91-2442-V dated the 12th day of February, 1992 is set forth in Appendix 5. The unreported Order of the District Court dated January 15, 1992, which dismissed the appeal of the Bankruptcy Court Order as moot in Case No. 90-2398-O is set forth in Appendix 6. The unreported Order of the Bankruptcy Court in response to the Order of Remand of the District Court on the issue of good faith purchaser dated November 25, 1991, is set forth in Appendix 7. The unreported Order of the District Court dated the 14th day of August, 1991 on remand to the Bankruptcy Court for determination of good faith purchaser status is set forth in Appendix 8. The unreported decision of the Bankruptcy Court in an Order entitled Supplemental Opinion to November 1, 1990, Order dated July 26, 1991, is set forth in Appendix 9. The unreported decision of the Bankruptcy Court in its Order entitled Order on Motion for Stay of Order Pending Appeal and Request for Evidentiary Hearing dated November 19, 1990, is set forth in Appendix 10. The unreported decision of the Bankruptcy Court in an Order entitled Order on Motion of G-K Development Company for Reconsideration and dated November 1, 1990, is set forth in Appendix 11. The unreported decision of the Bankruptcy Court entitled Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances dated September 14, 1990, is set forth in Appendix 12.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Tenth Circuit was entered May 21, 1993. The Tenth Circuit denied Petitioner's Motion for Rehearing and Suggestion for Rehearing en Banc on June 17, 1993. This Petition for a Writ of Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUIONAL PROVISIONS, STATUTES AND RULES

This case involves U.S. Constituion Amendments 5 and 14 § 1, 11 U.S.C. § 363(m), 11 U.S.C. § 364(e) and 11 U.S.C. § 544(a); former Bankruptcy Rule 805; and Bankruptcy Rules 2002(c) (1), 6005 and 8005. Because of the length of the Statutes and Rules, their text is set forth in Appendix 13.

STATEMENT OF THE CASE

Broadmoor Place Investments, L.P., a Kansas limited partnership, filed a Chapter 11 Petition in the United States Bankruptcy Court for the District of Kansas on October 31, 1989. The Debtor owned a single asset, an office building located in Mission, Kansas, which was secured by a first mortgage with Blue Valley Federal Savings & Loan (of which Respondent Resolution Trust Corporation is now the Receiver). Respondent Debtor elected to proceed on a private-sale basis and on June 19, 1990, signed a contract with Petitioner G-K for the sum of $5.3 million for the sale of its office building. An Addendum to that Contract was signed on July 18, 1990, which raised the purchase price to $5.7 million. Both the original Contract and the Addendum required Respondent Debtor to seek approval from the Bankruptcy Court upon execution and to use its best efforts to obtain approval. As part of the transaction, Petitioner provided Respondent Debtor with a letter of credit for $250,000.00 with the signing of the original Contract. The letter of credit was a requirement to allow Respondent Debtor to bid on an Internal Revenue Service lease for the property which would generate $1 million in additional rent over the lease term.

The Respondent Debtor did not seek approval upon execution of either the Contract or the Addendum and continued seeking additional buyers for the property which violated its written representation to Petitioner not to enter into any other contract. On August 7, 1990, the Debtor, after first informing Respondent Robinson of Petitioner's Contract, signed a second contract for the sale of its sole asset for $5.5 million. Respondent Debtor then filed an application for approval of the sale with the Bankruptcy Court and stated that it was not seeking approval of a specific contract but, instead, asked the Court to approve either Petitioner's or Respondent Robinson's contract. Prior to the

hearing, Respondent Debtor was informed that it had been awarded the Internal Revenue Service Lease. Respondent Debtor had known for two months prior to the execution of its contract with Respondent Robinson that he would have a partner in the transaction. Despite this knowledge, Respondent Debtor did not disclose Robinson's partner in its Application and Notice of Hearing given to Petitioner and all interested parties. At the hearing on September 10, 1990, Petitioner first learned that Respondent Robinson had a partner. The only witness to testify at the hearing on September 10, 1990, was an employee of Respondent Robinson's partner who testified about the financial credibility of the partner to act in large financial transactions. The Bankruptcy Court first chose Respondent Robinson's contract for approval and then, subsequently, rejected Petitioner's Contract. Respondent Debtor neither informed the IRS that Petitioner G-K's letter of credit was no longer binding nor did it replace the letter of credit. Respondent Robinson then assumed the lease with the IRS. Petitioner, after a Motion for Reconsideration was denied by the Bankruptcy Court, timely filed a Notice of Appeal and a Motion for Stay of Order. The Bankruptcy Court denied the stay on November 19, 1990. Petitioner then sought a stay order in the District Court (Case No. 90-2398-O). The District Court never ruled on Petitioner's stay request. Respondent Debtor transferred its office building to Respondent Robinson on December 7, 1990.

On July 26, 1991, while the original appeal to the District Court was pending, the Bankruptcy Court entered an Order captioned "Supplemental Opinion to November 1, 1990, Order on Motion of G-K Development Company for Reconsideration", which was filed on August 9, 1991. The Supplemental Opinion added additional findings to the Court's Order of September 10, 1990, and its denial of Petitioner's Motion for Re-hearing on November 1, 1990. On August 16, 1991, Petitioner appealed the "Supplemental Opinion" Order to the District Court.[1]

Because of the failure of the Bankruptcy Court to make a finding that Respondent Robinson was a good faith purchaser, on August 14, 1991, the District Court issued an Order of Remand to the Bankruptcy

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[1] Petitioner's appeal of the "Supplemental Opinion" was also numbered No. 90-2393-O in the District Court.

Court for a determination of Robinson's "good faith purchaser" status. At the initial hearing, the Bankruptcy Court received no testimony or documentary evidence on the issue of good faith purchaser. Neither Respondent Robinson nor any witness on his behalf testified on the issue of good faith purchaser status, nor did any witness on behalf of G-K testify. After remand, Petitioner filed in the Bankruptcy Court a Motion for Summary Judgment and Motion for Relief from Judgment or Order. In preparation for the hearing, Petitioner sought discovery on the issue of an undisclosed employment agreement between Respondent Robinson and a new corporation formed by the Debtor's general partner. This arose by the Debtor's general partner signing a contract on behalf of the Debtor, with his wife as secretary of his new corporation, to manage the Debtor's office building. Petitioner maintains that the management contract was never disclosed to nor approved by the Bankruptcy Court. Respondent Robinson admits assuming this management contract that originally compensated the Debtor's general partner's new corporation in the amount of $170,000.00, which was subsequently reduced to $100,000.00. The only issue that Respondent Robinson disputes is whether the contract was disclosed.[2] The Bankruptcy Court quashed all efforts of Petitioner for discovery from both the Respondent Debtor and Respondent Robinson, including the quashing of subpoenas for their presence at the hearing for determination on Respondent Robinson's status as a good faith purchaser. At the hearing, the Bankruptcy Court refused Petitioner's request that the Court hear testimony and receive documentary evidence. The Bankruptcy Court then made a finding from the September 10, 1990, record and incorporated its findings in its Supplemental Opinion dated July 26, 1991, that Respondent Robinson was a good faith purchaser. The Bankruptcy Court also denied Petitioner's Motion for Summary Judgment and Petitioner's Motion for Request for Relief from Judgment or Order. G-K appealed that Order to the District Court (Case No. 91-2442-V). On December 4, 1991, Respondent Resolution Trust Corporation filed a Motion to Dismiss all pending appeals as moot. On January 15, 1992, the District Court sustained the Motion to Dismiss

[2] The Debtor, in its contract with Petitioner, represented that no such management contract existed.

the appeal as moot in Case No. 90-2398-O. On February 12, 1992, the District Court sustained the Motion to Dismiss the appeal as moot in Case No. 91-2442-V. Notices of Appeal were filed from those Orders on February 13, 1992, and February 18, 1992, respectively, to the United States Court of Appeals for the Tenth Circuit. Both cases were consolidated on appeal (92-3043 and 92-3048). On May 21, 1993, the Tenth Circuit affirmed the District Court's dismissal on the basis of mootness. On June 2, 1993, Petitioner filed a Suggestion for Rehearing en Banc and Petition for Rehearing. On June 17, 1993, the Tenth Circuit denied both the Petition for Rehearing and Suggestion for Rehearing en Banc.

REASONS FOR ISSUING THE WRIT

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AS TO THE "MOOTNESS" RULE.

The Circuit Courts of Appeals are divided on the issue of whether an appeal is moot under 11 U.S.C. § 363(m) where a stay order has not been obtained.

Petitioner first sought a stay order from the Bankruptcy Court, which was denied, and then filed a Motion for Stay Order in the District Court prior to the transfer of the Debtor's office building. The District Court never ruled upon Petitioner's Motion for Stay Order and, subsequently, the Debtor's office building was transferred to Respondent Robinson. The District Court, upon receipt of the Bankruptcy Court's determination that Respondent Robinson was a good faith purchaser, even prior to receipt of the record on appeal in the District Court, dismissed Petitioner's appeal as moot, which was affirmed by the Tenth Circuit's decision. A bankruptcy court's determination of good faith purchaser status in the Tenth Circuit is issue determinative, even if the decision of the bankruptcy court on its finding of good faith purchaser is erroneous; mootness precludes an appeal on the merits.

The First Circuit, in In re Stadium Management Corp., 895 F.2d 845, (1st Cir., 1990), the Second Circuit, in U.S. v. Salerno, 932 F.2d 117 (2nd Cir., 1991), the Tenth Circuit, in In re Broadmoor, 994 F.2d

744 (10th Cir., 1993), and the Eleventh Circuit, in In re the Charter Co., 829 F2d 1054 (11th Cir., 1987) (per curiam), cert. denied, 485 U.S. 1014, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988), do not recognize any exceptions to mootness on the basis that absent a stay, upon completion of a sale to a good faith purchaser, the court must dismiss a pending appeal as moot. This standard of mootness has resulted in Circuit Courts leaving for another day whether the bidding process used is even appropriate or practical in the context of a judicial sale, In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 79 (1st Cir., 1993), and not reaching the issue of whether the Bankruptcy Court's actions were valid, In re The Charter Co., supra at 1055. The Tenth Circuit's decision invoking the standard of mootness did not address the primary issue of whether the Bankruptcy Court had jurisdiction to supplement an order on appeal, which it relied upon in making its determination of Respondent Robinson's good faith purchaser status.

The Third Circuit, in In re Abbott's Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir., 1986), has adopted exceptions to the mootness rule where (a) a bankruptcy court fails to make an express finding of good faith purchaser status, (b) a bankruptcy court refuses to hear evidence on the issue of collusion between the debtor and purchaser, (c) a bankruptcy court receives no evidence on the issue of value of the debtor's asset to be sold, and (d) a district court dismisses an appeal as moot prior to reviewing the record on appeal — all of which were present in the instant case.

The Fifth Circuit has adopted a policy that if state law otherwise provides the basis for a remedy, the purchaser is on notice and the appeal is not moot. Matter of Sullivan Cent. Plaza, I, Ltd., 914 F.2d 731, 734 (5th Cir., 1990)

In the Seventh Circuit, a party has a right of appeal to review whether or not the finding of the Bankruptcy Court on the issue of good faith purchaser or good faith lender under 11 U.S.C. § 364(e) is erroneous. In the Matter of EDC Holding Co., 676 F.2d 945 (7th Cir., 1982)

The Ninth Circuit recognizes two exceptions to the mootness rule under 11 U.S.C. § 363(m). The first is (1) where real property is sold to a creditor subject to the right of redemption and (2) where state law would otherwise permit the transaction to be set aside. In re Mann, 907

F.2d 923, 926 (9th Cir., 1990)

The Judicial Conference, in approving former Bankruptcy Rule 805, intended that it was to be "declaratory of existing case law." In the Matter of Abingdon Realty Corp., 530 F.2d 588, 590 (4th Cir., 1976) The Circuit Courts have uniformly not applied "existing case law" of general exceptions to mootness on appeal under 11 U.S.C. § 363(m). A direct conflict with the Tenth Circuit's decision applying existing case law is the Seventh Circuit's decision in Bastion v. Lakefront Realty Corp., 581 F.2d 685 (7th Cir., 1978) citing Porter v. Lee, 328 U.S. 246, 241, 66 S.Ct. 1096, 1099, 90 L.Ed. 1199 (1946) where an injunction was not obtained to prevent the sale and transfer of real property. The Seventh Circuit ruled that the appeal was not moot as it had jurisdiction of the parties and one of the parties had possession and control of the real estate asset in question. Further, no Circuit Court, in ruling upon an appeal involving 11 U.S.C. § 363(m), has recognized the additional exceptions to mootness that include (1) a court's failure to rule on a party's motion for stay, International Brotherhood of Boilermakers v. Kelly, 815 F.2d 912 (3rd Cir., 1987); (2) an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo, Wakefield v. Church of Scientology of California, 938 F.2d 1226 (11th Cir., 1991); (3) where the underlying dispute between the parties is capable of repetition which would result in the matter evading review, In re Commerce Oil Co., 847 F.2d 291 (6th Cir., 1988); and (4) the trial court's order will have possible collateral legal consequences, B & B Chemical Co. v. United States E.P.A., 806 F.2d 987 (11th Cir., 1986) *(quoting United States v. Geraghty, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980).*

This Court should resolve the direct conflict between the Third, Fifth, Seventh and Ninth Circuits, which allow exceptions to mootness on appeals involving good faith purchaser status under 11 U.S.C. § 363(m), and the First, Second, Tenth and Eleventh Circuits which do not recognize any exceptions to mootness. This Court should also resolve whether existing case law exceptions to mootness apply to 11 U.S.C. § 363(m).

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE PRINCIPLE THAT INTERESTS IN PROPERTY ARE DEFINED BY STATE LAW.

A. The Tenth Circuit's Decision Conflicts with the Principle that Property and Interests in Property are Defined by State Law Stated in Butner v. United States, 440 U.S. 48, 59 L.Ed.2d 136, 99 S.Ct. 914 (1979).

This Court has established that state law applies to the determination of interests in property in bankruptcy proceedings. Butner v. United States, supra, 918:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests of both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609, 81 S.Ct. 347, 350, 5 L.Ed.2d 323.

It is helpful to sketch briefly the rights and duties enjoyed under state law by each party to a transaction. Barnhill v. Johnson, 503 U.S. ____, 118 L.E. 39, 112 S. Ct. 1386, 1389 (1992) Respondent Robinson admitted in his pleadings he had knowledge that Respondent Debtor had first executed a contract with Petitioner for the purchase of the Debtor's real property. Kansas has long defined "good faith purchaser" as one who purchases in good faith, for valuable consideration, and without notice of the rights of other parties. Kruse v. Conklin, 108 P. 856, 82 Kan. 358 (1910). A purchaser who has actual knowledge of a prior agreement for the sale of real property, even where a deed has not been recorded, cannot be a "good faith purchaser" for value, Hughes v. Cook, 232 P. 219, 117 Kan. 394 (1925), and would be required to reconvey the property to the initial good faith purchaser. Federal Savings & Loan Ins. Corporation v. Urschel, 157 P.2d 805, 159 Kan. 674 (1945). In Kansas, a party who signs a contract with the representa-

tive of an estate is bound to the contract and cannot withdraw without cause, even prior to confirmation. Schul v. Clapp, 154 Kan. 372, 118 P.2d 570 (Kan. 1941). The same principle has long applied in bankruptcy law, that is, a purchaser is bound to its bid prior to confirmation and subjects the purchaser to damages for failure to perform. Camden v. Mayhew, 129 U.S. 73, 85, 86, 9 S.Ct. 246, 249, 32 L.Ed. 608 (1889)[3]

The Bankruptcy Reform Act of 1978, in 11 U.S.C. § 363(m), adopted the concept in former Bankruptcy Rule 805 that a buyer of bankruptcy estate assets must be a good faith purchaser. However, neither former Bankruptcy Rule 805, the new Bankruptcy Rule 8005 nor 11 U.S.C. § 363(m) define the term good faith purchaser. 2 Collier on Bankruptcy § 363.13 (15th Ed., 1985) Instead, most Circuits have adopted the traditional equitable principles of good faith purchaser that have been generally defined as one who buys in good faith, that is, free of any fraud, misconduct or collusion between the purchaser and other bidders or the debtor; for value; and without knowledge of any adverse claim. In re Rock Indus. Machinery Corp., 572 F.2d 1195 (7th Cir., 1978) The definition adopted by the Seventh Circuit was based upon the Eighth Circuit case of Meisirow v. Duggan, 240 F.2d 751 (8th Cir., 1957) which interpreted Missouri Real Property Law on the issue of good faith purchaser.

Circuit Courts have routinely relied on state law to determine good faith purchaser status under 11 U.S.C. § 544(a) (See Watkins v. Watkins, 922 F.2d 513 (10th Cir., 1991), In re Konowitz, 905 F.2d 55 (4th Cir., 1990) and In re Ward, 837 F.2d 124 (3rd Cir., 1988)). No Circuit Court has reviewed the issue of good faith purchaser under 11 U.S.C. § 363(m) by citing state real property law standards. The Tenth Circuit and the majority of Circuits adopting the In re Rock definition of good faith purchaser have created a federal common law of real property by failing to apply state real property standards. In the instant

[3] The Tenth Circuit's decision, without citing authority, suggests that a purchaser's bid is not binding on the debtor. The general rule is that both the purchaser and debtor, upon the execution of a contract, are bound until they are judicially relieved by the bankruptcy court. 4B Collier on Bankruptcy, § 70.98 [16] at 1173-74 (14th Ed. 1978)

case, federal common law of good faith purchaser status conflicts directly with Kansas state real property standards of good faith purchaser.

The Tenth Circuit's decision did not reference any Kansas real property principles that conflict with any federal purpose or bankruptcy statute. There is a direct conflict between the Tenth Circuit's decision and this Court's decision in Butner v. United States, supra, that interests in property are defined and created by state law unless some federal interest requires a different result.

B. The Tenth Circuit's Decision Conflicts with the Principle that a Party Should not Receive a Windfall by the Happenstance of Bankruptcy Stated in Lewis v. Manufacturers National Bank, 364 U.S. 603, 706, 81 S.CT. 347, 5 L.ED.2d 323 (1961)

In a Kansas state court, Respondent Robinson would be denied good faith purchaser status and be required to convey the property to Petitioner. In a federal bankruptcy court, Robinson has been deemed a good faith purchaser. Respondent Robinson has received a windfall by the happenstance of bankruptcy. The Tenth Circuit's decision conflicts directly with the decision of this Court in Lewis v. Manufacturers National Bank, supra.

C. The Tenth Circuit's Decision Conflicts with the Decisions of Lower Courts on the Issue that, in Bankruptcy, Good Faith Purchaser Status is Determined by State Law.

The only bankruptcy court case of record where a debtor executed two contracts for the sale of its sole real estate asset determined the issue of good-faith-purchaser status under state law. In re Flannery, 11 B.R. 974, (Bankr. E.D. Penn. 1981) Flannery exactly parallels the instant case as the debtor also executed two private sales contracts for the sale of its sole real property asset. As in the instant case, the purchaser under the second contract knew of existence of the first contract. The bankruptcy court in Flannery determined that, according to the law of

Pennsylvania where the contracts were made and executed, it was required to approve the first contract as the second buyer, because of his knowledge of the first contract, could not qualify as a good faith purchaser.

III. THE TENTH CIRCUIT'S DECISION DISREGARDS THE BANKRUPTCY REFORM ACT OF 1978'S WITHDRAWAL OF THE ADMINISTRATIVE FUNCTIONS OF THE BANKRUPTCY ESTATE FROM THE JURISDICTION OF THE BANKRUPTCY COURT.

A. The Tenth Circuit's Decision Conflicts with Congressional Intent as Expressed in the Legislative History of the Bankruptcy Reform Act of 1978.

One of the principle purposes of the Bankruptcy Reform Act of 1978 was to transfer estate administration from the court to the debtor, which includes the power of a debtor to sell or transfer assets without approval of the court after providing notice and no objections are made. The Debtor's application to the Bankruptcy Court in the instant case asked for an order to sell its asset to either Petitioner or Respondent Robinson as the Court may direct. The Bankruptcy Reform Act of 1978 withdrew jurisdiction from a court to act in such a fashion for a debtor and its jurisdiction is now either to approve or reject the proposed actions of the debtor or trustee.

H.R. No. 595, 95th Cong., 1st Sess; p. 108, *U.S. Code Cong. & Admin. News 1978*, p. 6069:

> If an objection to the proposed action is not made, then the trustee may proceed with the same authority as if he had obtained a court order authorizing the action. If an objection is made, the court will hear the dispute generated by the trustee's proposed action and the objection to it, and make the appropriate orders, either authorizing or prohibiting the trustee's proposed action. (Emphasis added)

The Tenth Circuit's decision directly conflicts with Congressional intent to remove administration of an estate from the court to the debtor.

B. The Tenth Circuit's Decision Conflicts with Decisions of Lower Courts on the Issue of Jurisdiction.

In Matter of Ohio Corrugating Co., 59 B.R. 11 (Bankr. N.D. Ohio 1985), the Debtor received two bids for the purchase of its real and personal property and asked the Court to approve either of the bids. The Court ruled that the Debtor was not asking the Court to confirm a sale to a bidder but, instead, was asking the Court to choose between two competing bidders which the Court could not undertake because of a Congressionally prohibited administrative function, Ohio, supra, at 12:

> To the extent the April 7, 1986, application of the Debtor-in-Possession seeks not our confirmation of sale to a bidder of the Debtor-in-Possession's choice but rather our choosing between two competing bidders, the Debtor-in-Possession asks the Court to undertake a Congressionally-prohibited administrative function. Such an action is beyond the jurisdictional mandate of Congress to bankruptcy courts and judges and may be subject to reversal on appellate review. *In re Russo*, supra, 762 F.2d 239 (2nd Cir., 1985)

In the case of In re Landscape Properties, Inc., 100 B.R. 445 (Bankr. E.D. Ark. 1988), the court was faced with the situation of being asked to select between two private sales agreements. The court held in Landscape, supra, at 447:

> It is clear that the court has no authority to designate a buyer from among several competing interests.

C. Bankruptcy Rule 6005 Prohibits a Bankruptcy Court from Acting as an Auctioneer.

Respondent Debtor did not ask the Bankruptcy Court for approval of a specific contract but, instead, asked the Bankruptcy Court to select either Petitioner's or Robinson's contract for approval as the Court may direct. Debtor's counsel, in post-confirmation hearings, stated that the Court once again, as it had on two previous occasions, was having to act as an auctioneer in selecting a bid on behalf of a debtor. The actions of the Bankruptcy Court conflict with the express provisions of Bankruptcy Rule 6005 that prohibit a bankruptcy court from acting as

an auctioneer.

IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE PRINCIPAL THAT A PARTY IS ENTITLED TO NOTICE OF A HEARING AND AN OPPORTUNITY TO PRESENT OBJECTIONS AS STATED IN MULLANE v. CENTRAL HANOVER BANK & TRUST CO., 339 U.S. 306, 70 S.CT. 652, 94 L.ED. 865 (1950), AND MEMPHIS LIGHT, GAS & WATER DIVISION v. CRAFT, 436 U.S. 1, 908 S.Ct. 1554, 56 L.Ed. 2d 30 (1978), AND UNDERCUTS THE POLICY OF NOTICE UNDER BANKRUPTCY RULE 2002(C)(1).

Petitioner, at the hearing on September 10, 1990, had no knowledge that Robinson had a partner in the transaction. Petitioner had no ability to object to the testimony that was presented by the employee of the undisclosed partner. Subsequently, Petitioner found that the testimony given by the partner's employee concerning the financial transactions of the partner were questionable in that they were subject to a stipulated antitrust consent order, which was not disclosed to the Bankruptcy Court. Petitioner thought it had a second opportunity to present its objections to the Bankruptcy Court with full notice because of the Order of remand to the Bankruptcy Court on the issue of good faith purchaser. The Bankruptcy Court refused all attempts of Petitioner to obtain discovery from Respondent Debtor and Respondent Robinson, and refused all efforts to conduct an evidentiary hearing on Respondent Robinson's good faith purchaser status. Instead, the Bankruptcy Court entered its finding of good faith purchaser status based upon the record of September 10, 1990, and its Supplemental Opinion of July 26, 1991.

The Bankruptcy Reform Act of 1978 adopted Bankruptcy Rule 2002(c)(1), which requires that a debtor disclose all terms of a transaction being presented to a bankruptcy court. Respondent Debtor had full knowledge that Respondent Robinson had a partner but failed to disclose the partner in the Notice of Hearing for September 10, 1990. Bankruptcy proceedings are subject to the

Fifth Amendment, United States v. Security Indus. Bank, 459 U.S. 70, 75, 103 S.Ct. 407, 410, 74 L.Ed.2d 235 (1982). Notice of a hearing has the dual function of apprising interested parties of an action and to afford them the opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 547, 94 L.Ed. 865 (1950) The purpose of notice under the due process clause "is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing". Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14, 98 S.Ct. 1554, 1563, 56 L.Ed.2d 30 (1978)

Petitioner was never given a hearing at which it was able to present objections after it received proper notice.

V. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE PRINCIPLE THAT THE FILING OF A NOTICE OF APPEAL CONFERS JURISDICTION ON THE APPELLATE COURT AND DIVESTS THE TRIAL COURT OF CONTROL OVER THOSE ASPECTS OF THE CASE INVOLVED IN THE APPEAL STATED IN MARRESE v. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, 470 U.S. 373, 84 L.ED.2d 274, 105 S.CT. 1327 (1985) AND GRIGGS v. PROVIDENT CONSUMER DISCOUNT CO., 459 U.S. 56, 74 L.ED.2d 225, 103 S.CT. 400 (1982)

In July, 1991, eight months after the initial appeal to the District Court, the Bankruptcy Court, prior to any remand from the District Court, entered a Supplemental Opinion to the Order on direct appeal to the District Court. The Supplemental Opinion related directly to the issues involved in the appeal to the District Court as it sought to modify by adding additional findings to the original Order on appeal. Subsequently, on August 14, 1991, an Order of remand was issued by the District Court to the Bankruptcy Court on the issue of good faith purchaser. On August 16, 1991, Petitioner appealed the issuance of the Supplemental Opinion to the District Court. The Bankruptcy Court, in its Order of November 27, 1991, pursuant to the Order of Remand, specifically referenced its Supplemental Opinion in its

findings of good faith purchaser status.

The actions of the Bankruptcy Court are in direct conflict with Marrese v. American Academy of Orthopaedic Surgeons, supra, and Griggs v. Provident Consumer Discount Co., supra, as it tried to take control over the aspects of a case involved in the appeal by supplementing its original findings. The Tenth Circuit's decision permitting this procedure directly conflicts with the Ninth Circuit's decision that a bankruptcy court is without jurisdiction to vacate or modify an order while on appeal. In re Bailac, 694 F.2d 625 (9th Cir., 1982)

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari should be granted to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Ronald L. Gold*
5959 Woodson
P. O. Box 2073
Shawnee Mission, KS 66201
(913) 362-0860

***Counsel of Record**

Counsel for Petitioner

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In Re:	)	
BROADMOOR PLACE INVESTMENTS, L. P.,	)	
Debtor,	)	
G-K DEVELOPMENT COMPANY, INC.,	)	
Appellant,	)	
v.	)	No. 92-3043 & 92-3048
BROADMOOR PLACE INVESTMENTS, L. P.; FORREST L. ROBINSON; RESOLUTION TRUST CORPORATION; BLUE VALLEY FEDERAL SAVINGS AND LOAN; U.S. TRUSTEE,	)	
Appellees.	)	

ORDER
Entered June 17, 1993

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and OWEN, District Judge.*

---

*The Honorable Richard Owen, Senior United States District Court Judge for the Southern District of New York, sitting be [sic] designa-

tion.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/
Patrick Fisher
Chief Deputy Clerk

APPENDIX 2

("Filed"-stamped
June 28, 1993)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In Re: BROADMOOR PLACE INVESTMENTS, L. P., Debtor, G-K DEVELOPMENT COMPANY, INC., Appellant, v. BROADMOOR PLACE INVESTMENTS, L. P.; FORREST L. ROBINSON; RESOLUTION TRUST CORPORATION; BLUE VALLEY FEDERAL SAVINGS AND LOAN; U.S. TRUSTEE, Appellees.	No. 92-3043 92-3048 (D. C. Nos. ✓90-2398-O 91-2442-V)

JUDGMENT
Entered May 21, 1993

Before KELLY and BARRETT, Circuit Judges, and OWEN, *District Judge.

---

*The Honorable Richard Owen, Senior United States District Court

Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher
Chief Deputy Clerk

... copy

...

Robert L. Hoecker
Clerk, U. S. Court of
Appeals, Tenth Circuit

/s/ Jim Powers

...

APPENDIX 3

("Filed"-stamped
June 28, 1993)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In Re:	)	
BROADMOOR PLACE INVESTMENTS, L. P.,	)	
Debtor,	)	
----------	)	
G-K DEVELOPMENT COMPANY, INC.,	)	
Appellant,	)	
v.	)	No. 92-3043 92-3048
BROADMOOR PLACE INVESTMENTS, L. P.; FORREST L. ROBINSON; RESOLUTION TRUST CORPORATION; BLUE VALLEY FEDERAL SAVINGS AND LOAN; U.S. TRUSTEE,	)	(D. C. Nos. 90-2398-O 91-2442-V)
Appellees.	)	

JUDGMENT
Entered May 21, 1993

Before KELLY and BARRETT, Circuit Judges, and OWEN, *District Judge.

---

*The Honorable Richard Owen, Senior United States District Court Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher
Chief Deputy Clerk

... copy

...

Robert L. Hoecker
Clerk, U. S. Court of
Appeals, Tenth Circuit

/s/ Jim Powers

...

APPENDIX 4

("Filed"-stamped
United States Court
of Appeals Tenth
Circuit.
May 21, 1993)

("Filed"-stamped
June 28, 1993)

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re: BROADMOOR PLACE INVESTMENTS, L. P., Debtor. G-K DEVELOPMENT COMPANY, INC., Appellant, vs. BROADMOOR PLACE INVESTMENTS, L. P.; FORREST L. ROBINSON; RESOLUTION TRUST CORPORATION; BLUE VALLEY FEDERAL SAVINGS AND LOAN; U.S. TRUSTEE, Appellees.	)	No. 92-3043 92-3048

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

William M. Modrcin, Kansas City, Missouri (Ronald L. Gold, Shawnee Mission, Kansas, with him on the brief) for Appellant.

Sherman A. Botts, John W. McClelland (Roy H. Farchmin, William F. Schoeb, Wirken & King, Kansas City, Missouri, and Michael R. Roser, Jennifer H. McCoy, Lathrop & Norquist, Kansas City, Missouri, with them on the brief) for Appellee.

Before KELLY and BARRETT, Circuit Judges, and OWEN, District Judge.*

---

*The Honorable Richard Owen, Senior United States District Court Judge for the Southern District of New York, sitting by designation.

OWEN, District Judge

G-K Development Company, Inc. ("G-K") appeals from an order of the United States Court for the District of Kansas affirming the Bankruptcy Court's approval of the sale of the Broadmoor Place office building in Mission, Kansas to one Forrest L. Robinson. G-K contends that it, not Robinson, was and is the rightful purchaser of the property.

Broadmoor Place Investments ("Broadmoor") was a Kansas limited partnership whose sole asset was the said building. Broadmoor filed a Chapter 11 petition in October, 1989. It then signed an agreement[1] in June and July 1990 for the sale of the building to G-K, for $5.7 million. The said agreement necessarily required Broadmoor to seek the approval of the Bankruptcy Court for the sale and to use its best efforts to obtain that approval.

Thereafter, in August, 1990, Broadmoor signed another agreement for the sale of the building to Robinson. G-K's bid was

---

[1] While G-K calls its collective signed instruments here a "contract", this is a misnomer since there can be no contract in this situation without Bankruptcy Court approval, In re Landscape Properties, Inc., 100 B.R. 445, 447 (Bankr. E.D. Ark. 1988). Accordingly, these instruments are but binding bids, and we so refer to them hereafter.

$5,700,000, subject to financing and other contingencies. The Robinson bid was $5,500,000 cash, no material contingenies [sic], and a $50,000 earnest money deposit. At this point, Broadmoor sought Bankruptcy Court approval for the sale. Broadmoor's application presented G-K's bid as the favored one, advising the Court, however, that a second bid had been signed on August 7, 1990, with Robinson. Broadmoor regarded the Robinson agreement as a back-up.

On September 10, 1990, the Bankruptcy Court approved the sale to Robinson, finding that it provided fewer contingencies and facilitated a more immediate closing. G-K appealed and sought a stay of the sale to Robinson. The Bankruptcy Court denied the stay on November 19, 1990. G-K then sought a stay in the District Court, which never ruled on the stay application. On December 7, 1990, the building was transferred to Robinson pursuant to the approval agreement.

On August 14, 1991, the District Court ruled on the merits of G-K's appeal and remanded to the Bankruptcy Court to determine Robinson's good faith purchaser status under § 363(m) of the Bankruptcy Code. The Bankruptcy Court declined to hold a hearing, but ruled that Robinson was a good faith purchaser. G-K's appeal from this ruling was dismissed by the District Court on the ground that the issues were moot within the meaning of Bankruptcy Code § 363(m) because the September 13, 1990 order and the sale of the Broadmoor asset had not been stayed pending G-K's appeal, the sale had closed on December 7, 1990, and Robinson was a good faith purchaser.

On this appeal, pursuant to 28 U.S.C. § 158(d), G-K's main contentions are that the Bankruptcy Court was in error in three respects. First, it should not have had both the G-K and Robinson contracts before it at the same time for consideration, and by making a selection, it was improperly participating in the administration of the bankrupt's estate, performing administrative duties which, since the Bankruptcy Code of 1978, have been the sole responsibility of the trustee or debtor in possession, not the Court. Accordingly, G-K contends, the Bankruptcy Court was without jurisdiction to make any selection, and consequently, its selection of the robinson bid was a nullity. Second, G-K contends that the Robinson "contract" was not

entered into in good faith, since Robinson had actual knowledge of the prior G-K "contract" and third, that being so, i.e. Robinson not being in good faith, the doctrine of mootness does not apply. On the basis of the foregoing, G-K seeks a remand of the proceeding to the Bankruptcy Court where, G-K submits, that Court, considering the G-K contract by itself, would find that G-K was a good faith purchaser, that its contract was acceptable, and upon acceptance would award G-K the Broadmoor office building pursuant to its terms.

Turning to G-K's first assertion of error, while there is support for its position that a Bankruptcy Court cannot be presented with competing bids from which it is to choose, since that would involve it in an impermissible participation in the administration of a bankrupt's estate, we hold that a Bankruptcy Court in a case such as this does have the power to disapprove a proposed sale recommended by a trustee or debtor-in-possession if it has an awareness there is another proposal in hand which, from the estate's point of view, is better or more acceptable, Landscape Properties, supra; See also 2 Lawrence P. King, Collier on Bankruptcy, ¶ 363.03[1] (15th ed. 1991) (normally, terms of sale "will ultimately rest in the judgment and discretion of the trustee, with the court becoming involved only when an issue is raised and a hearing is requested"); In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989) ("In order to achieve the goals of maximizing the value of the estate and protecting the interests of creditors, the court has plenary power to provide for competitive bidding.").

Next, since the G-K proposal was a bid and not a contract (see note 1, supra), there was no bad faith on Robinson's part in signing and submitting its proposal knowing of G-K's.[2]

Two further grounds asserted by G-K to vacate the sale to Robinson have but scant support in the record. These are 1) inadequate notice of the sale; and 2) collusion between Broadmoor and Robinson evidenced by an allegedly concealed management contract

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[2] Note that given the Bankruptcy Court's acceptance of the Robinson bid, G-K, absent some other meritorious ground for appeal, lacks standing to appeal, being merely an unsuccessful bidder and not an "aggrieved person" as is required. Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989); In re HST Gathering Company, 125 B.R. 466, 468 (Bankr. W.D. Tex. 1991).

between them. As to these claims, the notice of the hearing for the sale contained or referenced sufficient necessary information as to both bids and the time and place of their consideration. Next, as to the said management contract, while its details were not specified, the fact of its existence between Robinson and Broadmoor was specifically set forth in the Robinson bid on which the Bankruptcy Court acted, thus negating any claim of concealment and collusion. G-K's claim of collusion is further negated by the fact that Broadmoor proffered the G-K bid as its first choice. There is accordingly no basis to disturb the Bankruptcy Court's finding of November 25, 1991 that the Robinson transaction was in good faith and involved no fraud. Given this, we do not reach G-K's contentions as to the District Court's finding of mootness here, which finding, being undisturbed, is itself dispositive of this appeal.[3] Matter of Andy Frain Services, Inc., 798 F.2d 1113, 1125 (7th Cir. 1986).

The order of the District Court is affirmed.

[3] 11 U.S.C. § 363(m) provides: "The reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal." (emphasis added).

APPENDIX 5

("Filed"-stamped
Feb 12 '92)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Re: BROADMOOR PLACE INVESTMENTS, L. P., Debtor,	Case No. 89-21736-11
G-K DEVELOPMENT COMPANY, INC., Appellant, vs. BROADMOOR PLACE INVESTMENTS, L.P., FORREST L. ROBINSON, RESOLUTION TRUST CORPORATION, BLUE VALLEY FEDERAL SAVINGS AND LOAN, and UNITED STATES TRUSTEE, Appellees.	CIVIL ACTION No. 91-2442-V

ORDER

This case is before the court on the motion of appellee Resolution Trust Corporation (RTC) to dismiss this appeal (Doc. 3). In its motion, the RTC contends that, after the instant appeal was filed, Chief Judge Earl E. O'Connor issued a Memorandum and Order, In re: Broadmoor Place Investments, L.P., No. 90-2398-O (D.Kan. Jan. 16, 1992), which resolved all issues raised by this appeal. Having reviewed the record, the parties' briefs, and Chief Judge O'Connor's Memorandum and Order of January 16, 1992, the court finds that all issues raised by this appeal have indeed been resolved. On that basis,

the court concludes that the instant appeal is moot. The court hereby dismisses this appeal.

IT IS, THEREFORE, BY THE COURT ORDERED that the motion of appellee Resolution Trust Corporation to dismiss this appeal (Doc. 3) is granted. The appeal is hereby dismissed.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this __12__ day of February, 1992.

/s/

G. T. VAN BEBBER
United States District Judge

APPENDIX 6

("Filed"-stamped
Jan 16 '92)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In Re:	) Bankruptcy No.
BROADMOOR PLACE INVESTMENTS, L. P.,	) 89-21736-11
Debtor,	)
G-K DEVELOPMENT COMPANY, INC.,	)
Appellant,	) CIVIL ACTION
v.	) No. 90-2398-O
BROADMOOR PLACE INVESTMENTS, L.P., FORREST L. ROBINSON, RESOLUTION TRUST CORPORATION, BLUE VALLEY FEDERAL SAVINGS AND LOAN, and UNITED STATES TRUSTEE,	)
Appellees.	)

MEMORANDUM AND ORDER

This matter is before the court on a motion to dismiss all pending appeals filed by the Resolution Trust Corporation ("RTC") as Receiver of Blue Valley Federal Savings & Loan Association. For the reasons set forth below, the motion will be granted.

I. Background

Appellant G-K Development Company, Inc. ("G-K") originally appealed orders of the Bankruptcy Court dated September 14, 1990, and November 1, 1990.[1] In those orders, the Bankruptcy Court

[1] G-K now also appeals the Bankruptcy Court's order of November 27, 1991.

approved the debtor's application to sell real property free and clear of liens and encumbrances to appellee Forrest L. Robinson ("Robinson"). In response to G-K's appeal, Robinson and RTC filed motions to dismiss alleging that the property had been sold, thus rendering the appeal moot pursuant to section 363(m) of the Bankruptcy Code.

In reviewing the motions to dismiss, this court found that the Bankruptcy Court had never explicitly held that Robinson was "good faith purchaser." Accordingly, we remanded the action to the Bankruptcy Court for a determination on this question. On November 27, 1991, the Bankruptcy Court issued an order ruling that Robinson was a "good faith purchaser" within the meaning of section 363(m).

II. Discussion

As this court previously noted in its order of August 14, 1991, the threshold question is whether G-K's appeal is moot pursuant to section 363(m) of the Bankruptcy Code. Under section 363(m), an appeal of a bankruptcy court's authorization of a sale of real property cannot affect the rights of a good faith purchaser of the property, unless the appellant obtains a stay of the sale pending appeal. See 11 U.S.C. §363(m). Thus, "[a]bsent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently." In re Stadium Management Corp., 895 F.2d 845, 847 (1st Cir. 1990) (citations omitted).

The court has reviewed the Bankruptcy Court's findings concerning Robinson's status as a "good faith purchaser" and finds that they were not clearly erroneous. See In re Bel Air Associates, Ltd., 706 F.2d 301, 305 (10th Cir. 1983); see also Bleaufontaine, Inc. v. Roland Int'l., 634 F.2d 1383, 1389 (5th Cir. 1981) (holding that factual findings of bankruptcy court must be accepted and affirmed unless clearly erroneous). Accordingly, because no stay was entered and the property in question has been sold to a "good faith purchaser," the court finds that G-K's appeal is moot. See Bel Air, 706 F.2d at 305.

IT IS THEREFORE ORDERED that the motion to dismiss all pending appeals filed by the Resolution Trust Corporation as Receiver of Blue Valley Federal Savings & Loan Association (Doc. #36)

is granted.

Dated this 15th day of January, 1992, at Kansas City, Kansas.

/s/
Earl E. O'Connor, Chief Judge

APPENDIX 7

("Filed"-stamped
Nov 27 1991)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	Case No.
BROADMOOR PLACE INVESTMENTS, L. P.,	)	89-21736
	)	
Debtor,	)	
	)	

ORDER IN COMPLIANCE WITH RULING OF DISTRICT COURT; ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND MOTION FOR RELIEF FROM JUDGMENT OR ORDER; ORDER GRANTING MOTION TO WITHDRAW JOINT MOTION FOR ORDER STAYING APPEAL

Now on this 25th day of November, 1991, this matter comes on before the Court pursuant to the District Court's ruling of August 14, 1991. The District Court remanded this proceeding to this Court for a determination of whether appellee Forrest L. Robinson (hereinafter "Robinson") was a "good faith purchaser". This matter is also before the Court pursuant to G-K Development Company's (hereinafter "G-K") motion for summary judgment on the issue of good faith purchaser, G-K's motion for relief from judgment or order of the court dated September 10, 1990, appellees' joint motion for order staying appeal, motion of G-K to dismiss joint motion for stay, and motion of G-K to strike memorandum of Forrest L. Robinson in opposition to motion for relief from judgment and memorandum of Forrest L. Robinson in

opposition to motion for summary judgment. Broadmoor Place Investments, L.P. (hereinafter "debtor") appeared by and through its attorney, F. Stannard Lentz. G-K appeared by and through its attorneys, William M. Modrcin and Ronald L. Gold. The United States Trustee appeared by and through its attorney, Joyce Owen. Forrest L. Robinson appeared by and through his attorney, John W. McClelland. The RTC appeared by and through its attorney, Michael R. Roser. Carteret Savings appeared by and through its attorneys, Frank Barker, III, Robert A. Pummill and Kip A. Stetzier. Village Gardens appeared by and through its attorney, Christopher R. Hedican. There were no other appearances.

After reviewing the files, pleadings, and transcripts, hearing arguments of counsel, and taking judicial notice of the record, this Court finds as follows:

1. That a hearing was held on September 10, 1990, on the Application of Debtor for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances (hereinafter the "Application"). The Application states that the debtor has entered into two real estate contracts, one with G-K and the other with Robinson. The Application prays for an order allowing the debtor to sell the real property to either G-K or Robinson, however it states that "[d]ebtor favors acceptance of the G-K contract since it was presented and accepted first by the parties" and the Robinson contract was regarded "as a back-up contract to that submitted by G-K".

2. That after proper notice was sent to all parties, the September 10, 1990 hearing came before the Court during the Court's regular week of hearings scheduled for less than 10 minutes. Upon the suggestion of debtor's counsel that the matter was quite involved and may be lengthy, the Court, without objection, put the case on the "heel" of the docket to allow more time for the hearing. Although Mr. Gold was present when the case was originally called, when the hearing resumed, G-K's counsel stated that her client, Ronald Gold, had to leave due to a previous engagement and that her firm was not retained by G-K until the prior week. Based on those facts, G-K's counsel requested a continuance. The Court found a continuance to be unwarranted and denied the request. After hearing the evidence presented by the parties, this Court approved the sale of real property free and clear

of liens and encumbrances to Robinson.

3. That on November 6, 1990, G-K filed its Notice of Appeal, appealing this Court's Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances.

4. That the District Court remanded this proceeding to this Court for a determination of whether appellee Forrest L. Robinson was a "good faith purchaser." The District Court's Memorandum and Order states that it is unable to resolve this matter because the Bankruptcy Court never explicitly held that Robinson was a "good faith purchaser" (emphasis added).

5. That although the Federal Rules of Bankruptcy Procedure do not define "good faith purchaser," courts have turned to the tradi-tional equitable definition of a "good faith purchaser" and hold that a "good faith purchaser" is one who buys in "good faith" and for "value". In re Bel Air Associates, Ltd., 706 F.2d 301, 305 (10th Cir. 1983).

6. That there is no question that Robinson has purchased the real property "for value." The Robinson contract called for a purchase price in the amount of $5.5 million, with an earnest money deposit in the amount of $5,000 upon execution of the contract and an additional $45,000 upon approval by this Court. The sale closed on December 7, 1990; and the full $5.5 million was paid in accordance with the contract.

7. That conduct destroying "good faith purchaser" status "in-volves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." Id. This Court's Supplemental Opinion to November 1, 1990 Order on Motion of G-K Development Company for Reconsideration already sets forth the Court's finding that there has been no showing of mistake or fraud on the part of Robinson. Although the Court has already found an absence of fraud, G-K implies that collusion on the part of Robinson destroys his status as a good faith purchaser.

8. That not only did the evidence fail to establish collusion between Robinson and the debtor, but there was evidence that the debtor actually favored the G-K contract.

9. That Robinson is a "good faith purchaser" within the meaning of 11 U.S.C. § 363(m).

10. That the appellees have agreed to withdraw their Joint Motion for Order Staying Appeal, with a stay of execution 10 days from the date of this Order.

IT IS THEREFORE, BY THE COURT, ORDERED That appellee Forrest L. Robinson shall be and is hereby determined to be a "good faith purchaser" pursuant to 11 U.S.C. § 363(m).

IT IS FURTHER, BY THE COURT, ORDERED That G-K's Motion for Relief From Judgment or Order of the Court Dated September 10, 1990, shall be and the same is hereby DENIED.

IT IS FURTHER, BY THE COURT, ORDERED That G-K's Motion to Strike Memorandum of Forrest L. Robinson in Opposition to Motion for Relief From Judgment and Memorandum of Forrest Robinson in Opposition to Motion for Summary Judgment shall be and the same is hereby moot and therefore DENIED.

IT IS FURTHER, BY THE COURT, ORDERED That Appellees' Joint Motion for Order Staying Appeal shall be and the same is hereby WITHDRAWN, with a stay of execution for 10 days following the entry of this Order.

IT IS FURTHER, BY THE COURT, ORDERED That G-K's Motion to Dismiss Joint Motion for Stay shall be and the same is hereby moot and therefore DENIED.

IT IS FURTHER, BY THE COURT, ORDERED That the Clerk of this Court is to return this Order and Record to the Honorable Earl E. O'Connor, Chief Judge of the U.S. District Court as directed by him for ruling on pending motions.

Dated at Kansas City, Kansas, this 27th day of November, 1991.

_____

BENJAMIN E. FRANKLIN, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

APPENDIX 8

("Filed"-stamped
Aug 14 '91)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
BROADMOOR PLACE INVESTMENTS, L. P.,	)	Bankruptcy No. 89-21736-11
Debtor,	)	
G-K DEVELOPMENT COMPANY, INC.,	)	
Appellant,	)	
v.	)	
BROADMOOR PLACE INVESTMENTS, L.P., FORREST L. ROBINSON, RESOLUTION TRUST CORPORATION, BLUE VALLEY FEDERAL SAVINGS AND LOAN, and UNITED STATES TRUSTEE,	)	CIVIL ACTION No. 90-2398-O
Appellees.	)	

MEMORANDUM AND ORDER

This matter is before the court on appellant G-K Development Company, Inc.'s ("G-K's") appeal from orders of the Bankruptcy Court dated September 14, 1990, and November 1, 1990. In those orders, the Bankruptcy Court approved the debtor's application to sell real property free and clear of liens and encumbrances to appellee Forrest L. Robinson ("Robinson"). Robinson and appellee Resolution Trust Corporation ("RTC") have filed motions to dismiss the appeal alleging that the property has been sold and the appeal is moot pursuant to § 363(m) of the Bankruptcy Code. For the reasons set forth below, the court finds it necessary to remand this action to the Bankruptcy Court.

To briefly summarize the facts of this case, the debtor filed its petition under Chapter 11 of the Bankruptcy Code on October 31, 1989.

Subsequently, on August 8, 1990, debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances. On September 10, 1990, the bankruptcy Court held a hearing on the matter and approved the sale of real property to robinson. G-K filed a motion for reconsideration, which was denied by the bankruptcy Court on November 1, 1990. On November 6, 1990, G-K filed its notice of appeal and a motion for stay with the Bankruptcy Court. On November 19, 1990, the Bankruptcy Court denied the motion for stay. G-K then filed a motion for stay with this court on November 27, 1990. No action was taken on the motion for stay, and the sale of the real property to Robinson took place in early December of 1990.

The threshold question before the court is whether G-K's appeal is moot pursuant to § 363(m). Thus, "[a]bsent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently." In re Stadium Management Corp., 895 F.2d 845, 847 (1st Cir. 1990) (citations omitted). Here, because no stay was entered and the sale of the property to Robinson has taken place, G-K's appeal will be deemed moot if Robinson is found to be a "good faith purchaser." However, the court finds that it is unable to resolve this matter because the Bankruptcy Court never explicitly held that Robinson was a "good faith purchaser." See In re Abbotts' Dairies of Pennsylvania, Inc., 788 F.2d 143, 148-49 (3d Cir. 1986); In rel Bel Air Associates, Ltd., 705 F.2d 301, 304 (10th Cir. 1983). Accordingly, the court finds it necessary to remand the case to the Bankruptcy Court for a determination on this question.

IT IS THEREFORE ORDERED that this matter is hereby remanded to the Bankruptcy Court for a determination of whether appellee Forrest L. Robinson was a "good faith purchaser." Thereafter, the record shall be returned to this court for a ruling on the pending motions.

Dated this 14th day of August, 1991, at Kansas City, Kansas.

/s/

EARL E. O'CONNOR, Chief Judge

APPENDIX 9

("Filed"-stamped
Jul 26 1991)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BROADMOOR PLACE INVESTMENTS, L.P.,	)	Case No.
Debtor	)	89-21736-11
	)	

SUPPLEMENTAL OPINION TO NOVEMBER 1, 1990 ORDER ON MOTION OF G-K DEVELOPMENT COMPANY FOR RECONSIDERATION

This matter comes on before the Court pursuant to the Order on the Motion of G-K Development Company for Reconsideration signed by this Court on November 1, 1990. In its Order the Court reserved the right to file a supplemental opinion to address issues involved therein in greater detail if a party thereto filed a timely appeal. On November 6, 1990, a notice of appeal was filed by G-K Development Company.

At the October 11, 1990 hearing, the movant, G-K Development Company, appeared by and through its attorneys, Janice E. Stanton and Ronald L. Gold. The Resolution Trust Corporation as successor in interest to Blue Valley Federal Savings & Loan Association appeared by and through its attorney, Chris W. Henry. Forrest L. Robinson appeared by and through his attorneys, Ilene M. Martello and Roy H. Farchmin. The debtor, Broadmoor Place Investments, L.P., appeared by and through its attorney, F. Stannard Lentz. There were no other appearances.

FINDINGS OF FACT

Based upon the pleadings and the record, this Court finds as follows:

1. That on October 31, 1989, the debtor, Broadmoor Place Investments, L.P. (hereinafter "debtor") filed its petition under Chapter 11 of Title 11 United States Code.

2. That on August 8, 1990, debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances.

3. That on September 10, 1990, after hearing the evidence presented by the parties, this Court approved the sale of real property free and clear of liens and encumbrances to Forrest L. Robinson (hereinafter "Robinson").

4. That on September 24, 1990, G-K Development Company, Inc. (hereinafter "G-K Development") filed its Motion for Reconsideration and Rehearing for Order Approving Sale of Property Free and Clear of Liens and Encumbrances.

5. That on October 11, 1990, after hearing the arguments of counsel, this Court denied the Motion of G.K. Development Company for reconsideration of the Court's Order; and an Order was entered by the Court on November 1, 1990.

CONCLUSIONS OF LAW

Pursuant to its Order dated November 1, 1990, this Court denied G-K Development's Motion for Reconsideration and Rehearing for Order Approving Sale of Property Free and Clear of Liens and Encumbrances. The Court found that none of the six enumerated reasons to grant a motion for reconsideration found in Rule 60 of the Federal Rules of Civil Procedure (adopted by the bankruptcy Code in Bankruptcy Rule 9024) were applicable in this case.

Moreover, this Court reconsidered its prior evaluation of the relative merits of the G-K Development contract and the Forrest L. Robinson contract; and this Court stands by its previous finding that the Robinson contract is more advantageous to the bankruptcy estate. The Robinson contract had already paid $50,000 in earnest money deposit. Further, the G-K Development contract provided for a financing contingency and a contingency based upon the consummation of the Internal Revenue Service lease. The Robinson contract had no such contingencies.

In G-K Development's Motion for Reconsideration the movant stated that attorneys for G-K Development had only ben retained on Friday, September 7, 1990 (the hearing was September 10, 1990).

Moreover, Ms. Stanton, G-K's attorney, stated that Ronald L. Gold, President of G-K Development and also an attorney, could not testify at the hearing due to a previous engagement—therefore, Gold could not advise the Court as to his financing arrangement.

The following pertinent part of Rule 60 of the Federal Rules of Civil Procedure enumerates six reasons for a Court to reconsider its decision:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On a motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospec-tive application; or (6) any other reason justifying relief from the operation of the judgment....

The moving party bears the burden of demonstrating one of the enumerated grounds. Matter of GEX Kentucky, Inc., 100 B.R. 887 (Bankr. N.D. Ohio 1988) aff'd 127 B.R. 374 (N.D. Ohio 1991). G-K Development has not done so. In re Padget, 119 B.R. 793 (Bankr. D. Colo. 1990); In re Rebeor, 89 B.R. 314 (Bankr. N.D.N.Y. 1988).

The Court finds that there has been no showing of mistake or fraud which would support G-K Development's motion. Nor has there been any action on the judgment which would grant G-K Development the relief it seeks. See F.R.C.P. 60(b)(4), (5). Moreover, G-K Development has not presented any newly discovered evidence that could not have been presented at the September 10 hearing.

This Court further finds that notice went out to all parties in interest

on August 8, 1990 that the Court would entertain the debtor's motion to sell the real property, and that objections to the sale were to b filed by September 4, with the hearing being held on September 10. This gave the interested parties one month to prepare for the hearing. Mr. Gold, himself an attorney, chose to wait until three days before the hearing to retain counsel. Moreover, this hearing was scheduled during the Court's regular week of hearings scheduled for less than ten minutes, so when the clerk called the case, Mr. Lentz, attorney for the debtor, stated that this hearing could be lengthy. Thus, the Court stated that it would put the matter on the "heel," and no objections were made. Mr. Gold was present at the time, as was his attorney, Ms. Stanton. Mr. Gold then left the hearing. Ms. Stanton stated to the Court that Mr. Gold "was previously engaged at 79th and State Line and had to leave." Tr. at 10.

Furthermore, Bill Mantz from Diversified Financial appeared on behalf of Mr. Gold at the September 10 hearing. However, after speaking with Mr. Mantz, Ms. Stanton stated that he would not "be able to testify today because he doesn't have some of the information available to him." Tr. at 45. Thus, the evidence that G-K Development seeks to present could have been presented on September 10 but for their own neglect. In re West Coast Development Corp. of Naples, Inc., 89 B.R. 993 (Bankr. S.D. Fla. 1988) ("Forgetfulness and the press of other more important business is insufficient to establish excusable neglect." Id. at 995 (quoting, In re Uiterwyk Corp., 57 B.R. 166 (Bankr. M.D. Fla. 1986)). A rehearing would only re-litigate matters already presented to the Court on September 10.

The Court therefore finds that the motion for reconsideration should be denied in that there have not been sufficient grounds presented to warrant the Court granting such a motion.

This Supplemental Memorandum shall constitute my Findings of Fact and Conclusions of Law under Bankruptcy Rule 7052 and Rule 52(a) of the Federal Rules of Civil Procedure.

Dated at Kansas City, Kansas, this 26th day of July, 1991.

/s/

Benjamin E. Franklin, Chief Judge
United States Bankruptcy Court
District of Kansas

APPENDIX 10

("Filed"-stamped
Nov 28 1990)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	Case No.
BROADMOOR PLACE INVESTMENTS,L.P.,	)	89-21736-11
Debtor,	)	
	)	

ORDER ON MOTION FOR STAY OF ORDER PENDING APPEAL AND REQUEST FOR EVIDENTIARY HEARING

NOW on this 19th day of November, 1990, comes on for hearing the Motion for Stay of Order Pending Appeal and Request for Evidentiary Hearing. Ronald L. Gold appears for G-K Development Company, Inc. ("G-K"); F. Stannard Lentz of Lentz & Clark, P.A. appears for the Debtor; Chris W. Henry of McDowell, Rice & Smith appears for the Resolution Trust Corporation ("RTC"); and Ilene M. Martello, John W. McClelland and Roy H. Farchmin of Wirken & King appear for the purchaser, Forrest L. Robinson ("Robinson"). There are no other appearances.

After hearing statements of counsel, reviewing the file and being otherwise fully advised in the premises, the Court finds and orders as follows:

1. Objections to the Motion were filed by the Debtor, RTC and Robinson.

2. Debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances on August 8, 1990. Notice was mailed to all creditors and other parties in interest. A hearing was held on the Debtor's Application on September 10, 1990.

3. G-K had notice of the Application and was represented at the hearing by Janice Stanton of Shughart, Thomson & Kilroy. Ronald

Gold, principal of G-K was present at the September 10, 1990 hearing, however, he left prior to its conclusion.

4. At the September 10, 1990 hearing the Court heard evidence and ruled on the evidence presented.

5. The Court hereby denies the request of G-K to present the evidentiary testimoney [sic] of M. Duane Drew, general partner of Debtor.

6. The Court specifically finds that the Appellant, G-K, is not likely to prevail on the merits of an appeal and that the estate and other creditors would suffer irreparable harm if a stay is granted.

7. It is in the best interest of the Debtor's estate that the Motion be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings be reduced to orders of this Court as though fully set forth herein.

IT IS SO ORDERED this 28th day of November, 1990.

/s/

Honorable Benjamin E. Franklin
Bankruptcy Judge

Submitted by:

/s/

F. Stannard Lentz 06596
Lentz & clark, P.A.
P. O. Box 12167
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(913) 648-0600
Attorney for Debtor

DB13-BO3

APPENDIX 11

("Filed"-stamped
Nov 01 1990)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BROADMOOR PLACE INVESTMENTS,L.P.,	)	Case No.
	)	89-21736-11
Debtor,	)	
	)	

ORDER ON MOTION OF G.K. DEVELOPMENT COMPANY FOR RECONSIDERATION

NOW on this 11th day of October, 1990, comes on for hearing the Motion for G.K. Development Company ("GK") for reconsideration of the Court Order of September 10, 1990, approving the sale of real property free and clear of liens and encumbrances. Janice E. Stanton of Shughart, Thompson & Kilroy appears for GK; Chris Henry of McDowell, Rice & Smith, Chartered, appears for the RTC/Blue Valley Federal Savings & Loan; Roy Farchmin and Eileen M. Martello of Wirkin & King appear for Forrest Robinson ("Robinson"); and F. Stannard Lentz of Lentz & Clark, P.A. appears for the Debtor. There are no other appearances. The Court, having reviewed the file, heard statements of counsel and statements of Ron Gold, principal of GK, and being otherwise fully advised in the premises, finds and orders as follows:

1. On August 8, 1990, Debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances which prayed for an Order of this Court approving the sale of certain real property to one of two parties, G-K Development Company, Inc. ("G-K") or Forrest L. Robinson, subject to the terms and conditions set forth in the respective contracts. Notice of said Application with an opportunity for hearing on objections was given to all creditors and parties in interest as directed by the Court.

2. A hearing on said Application was held on September 10, 1990

at which hearing the Court approved the Forrest L. Robinson contract. Although the G-K contract provided for total consideration in the amount of $5.7 million while the Forrest L. Robinson contract provided for a purchase price of $5.5 million, the Forrest L. Robinson contract contained no financing contingency, was not contingent upon the execution of a certain lease to the Internal Revenue Service, and provided for an earnest money deposit in the amount of $50,000.00. This Court felt that the certainty provided by the Forrest L. Robinson contract made it the more desirable contract for the bankruptcy estate.

3. This Court entered its written Order approving the sale of real property pursuant to the terms and conditions of the Forrest L. robinson contract on September 14, 1990.

4. On or about September 25, 1990, G-K Development filed what it titled its Motion for Reconsideration of this Court's Order approving the Forrest L. Robinson contract. A hearing on said Motion to Reconsider was held on October 11, 1990.

5. The Bankruptcy Rules do not admit of any form of action known as a "motion for reconsideration", however, this Court believes that G-K in fact seeks relief from judgment pursuant to Bankruptcy Rule 9024 and F.R.C.P. 60.

6. F.R.C.P. 60 provides for relief from a judgment or order of the Court for one of six enumerated reasons, none of which were alleged by G-K or are applicable in this case. Thus, G-K is not entitled to relief from the Order of this Court approving the sale of the real property to Forrest Robinson.

7. Although G-K's Motion for Reconsideration may be procedurally flawed, this Court has reconsidered its prior evaluation of the relative merits of the Forrest L. Robinson and G-K contracts and stands by its previous findings that the Forrest L. Robinson is more advantageous to the bankruptcy estate. The Forrest L. Robinson contract provides for an earnest money deposit of $50,000.00 which has been paid. Further, the Forrest L. Robinson contract provides for no financing contingency and no contingency based upon the consummation of the Internal Revenue Service lease. The only contingencies embodied within the Forrest L. Robinson contract are standard title contingencies.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion of G-K Development Company for reconsideration is denied.

The Court reserves the right to enter a written opinion upon appeal of its Order Approving Sale of real Property Free and Clear of Liens and Encumbrances dated September 14, 1990 or the instant Order denying Motion for Reconsideration.

IT IS SO ORDERED this 1st day of November, 1990.

/s/ Benjamin E. Franklin
Honorable Benjamin E. Franklin
Bankruptcy Judge

Submitted by:

/s/

F. Stannard Lentz 06596
Lentz & Clark, P.A.
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Attorney for Debtor

DB13-BO2

APPENDIX 12

("Filed"-stamped
Sep 10 1990)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	Case No.
BROADMOOR PLACE INVESTMENTS, L.P.,	)	89-21736-11
Debtor.	)	
	)	

ORDER APPROVING SALE OF REAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES

NOW on this 10th day of September, comes on for hearing the Application of the Debtor, Broadmoor Place Investments, L.P. ("Debtor") for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances. F. Stannard Lentz and Russell Leffel appear for the Debtor, Janice Stanton appears for G-K Development Company ("G-K"), Roy Farchmin and Ilene M. Martello appear for Forrest L. Robinson ("Robinson"), and Chris Henry appears for Blue Valley Federal Savings & Loan ("Blue Valley") and the Resolution Trust Corporation ("RTC"). There are no other appearances. The Court, after hearing statements of counsel, testimony, reviewing the evidence and being otherwise fully advised in the premises, finds and orders as follows:

1. That the Debtor's Application was filed on August 8, 1990 and that notice of the Application with an opportunity for hearing and objections was given to all creditors and parties in interest as directed by the Court. The RTC filed its objection on September 5, 1990, however, no other objections have been filed or stated to the Court. Robinson filed his Request for Approval of Sale of Real Property Pursuant to Forrest L. Robinson Contract on September 5, 1990.

2. The RTC objection was considered by the Court and sustained as to the G-K contract but denied as to the Robinson contract with the exception that the Court will require that Robinson forthwith deposit, as earnest money, the total of $50,000.00.

3. After considering both contracts, the Court finds that it is in the best interest of the Debtor's estate to approve the Robinson contract.

4. The Robinson contract provides fewer contingencies, provides for a more immediate closing, and the evidence reflects that there should be no financing contingencies.

5. The Robinson contract is not subject to the execution of the Internal Revenue Service ("IRS") lease, however, Robinson is willing to accept the IRS lease provided the proposed lease agreement is as represented by the Debtor. Robinson has agreed to notify Debtor's counsel and RTC's counsel by 4:00 o'clock p.m. September 11, 1990 of its acceptance or rejection of that contract.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Robinson contract be and is hereby approved for $5.5 million; that the sale be free and clear of all liens and encumbrances with said liens and encumbrances, if any, to attach to the proceeds of sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sale proceeds be held by the Debtor in an interest-bearing account subject to the further Orders of this Court.

IT IS SO ORDERED this 14th day of September, 1990.

/s/ Benjamin E. Franklin
Honorable Benjamin E. Franklin
Bankruptcy Judge

ATTEST: A true copy
Benjamin E. Franklin,
Bankruptcy Judge
By: /s/ Clerk

Submitted by:

/s/ F. Stannard Lentz
Lentz & Clark, P. A.
P. O. Box 12167
Overland Park, KS 66212-0167
(913) 648-0600
Attorney for Debtors

DB12-BO

APPENDIX 13

1. U.S. Constitution, Amendment 5. — CRIMINAL PROSECUTIONS; DUE PROCESS OF LAW; EMINENT DOMAIN

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Constitution, Amendment 14. — RIGHTS AND IMMUNITIES OF CITIZENS

§ 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Former Bankruptcy Rule 805:

Rule 805. Stay Pending Appeal.

A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. Notwithstanding Rule 762 but subject to the power of

the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other appropriate security with the referee. A trustee or receiver may be required to give a superseded bond or other appropriate security in order to obtain a stay when taking an appeal. Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

4. **Rule 2002. Notices to Creditors, Equity Security Holders, and United States and United States Trustee.**

(c) Content of Notice.

(1) Proposed Use, Sale, or Lease of Property. Subject to Rule 6004 the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property.

5. **Rule 6005. Appraisers and Auctioneers.**

The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of com-

pensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.

6. **Rule 8005. Stay Pending Appeal.**

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

7. **U.S. Bankruptcy Code, 11 U.S.C. § 363(m):**

§ 363. Use, sale, or lease of property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a

sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

8. **U.S. Bankruptcy Code, 11 U.S.C. § 364(e):**

§ 364. Obtaining credit.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

9. **U.S. Bankruptcy Code, 11 U.S.C. § 544(a)**

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

No. 93-464

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.,

Petitioner,

vs .

BROADMOOR PLACE INVESTMENTS, L.P., et al.,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 93-464

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.,

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Respondents.

SUPPLEMENT TO

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

On July 15, 1993, District Judge Earl E. O'Connor entered an Order in the above proceedings which was not received by counsel for Petitioner. Counsel for Petitioner first learned of the existence of the Order while conducting research on October 7, 1993.

SUPPLEMENT TO OPINIONS BELOW

The decision of the U.S. District Court dismissing the challenge to the disbursement Order dated July 15, 1993, is reported at 157 B.R. 34 and is set forth in Appendix A attached hereto.

Respectfully submitted,

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Appendix A ("Filed"-stamped JUL 15 1993)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	Bankruptcy
BROADMOOR PLACE INVESTMENTS, L.P., Debtor.	)	No. 89-21736-11
	)	
	)	
G-K DEVELOPMENT COMPANY, INC., Appellant,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 93-2059-O
	)	
BROADMOOR PLACE INVESTMENTS, L.P., et al.,	)	
	)	ENTERED ON
	)	THE DOCKET
Appellees.	)	DATE: 7/15/93
	)	

MEMORANDUM AND ORDER

This matter is before the court on the motion of appellee Resolution Trust Corporation ("RTC") to dismiss this appeal of an Order Authorizing Disbursement of Sale Proceeds and Modifying Automatic Stay entered by the United States Bankruptcy Court for the District of Kansas on January 29, 1993 (Case No. 89-21736-11) (Doc. #2). For the reasons set forth below, appellee's motion

will be granted.

This dispute arises from the sale of property known as Broadmoor Place. The debtor, Broadmoor Place Investments, L.P., filed a Chapter 11 petition on October 31, 1989. At that time, the debtor owed appellee RTC, as receiver of Blue Valley Federal Savings and Loan Association, $8,005,256.76, plus accruing interest, attorney's fees, collection costs, and other charges.

The debt was secured by a first and prior perfected security interest in the Broadmoor Place office building.

In June 1990, both appellant G-K Development Company, Inc. ("G-K") and appellee Forrest L. Robinson submitted bids to purchase the Broadmoor Place property. After a September 10, 1990, hearing, the bankruptcy court issued orders on September 14, 1990, and November 1, 1990, approving the sale of the property to Robinson. G-K appealed the orders authorizing the sale and both the district court and the Tenth Circuit affirmed the bankruptcy court.

In the interim,[1] the bankruptcy court entered the order at issue here authorizing the disbursement of the sale proceeds. G-K now

---

1 The bankruptcy proceedings were not stayed during the pendency of the appeals.

challenges that order authorizing disbursement. Appellee seeks dismissal of this appeal on the grounds that G-K does not have standing to challenge the order authorizing the disbursement of the sale proceeds because G-K was not an "aggrieved person." G-K filed its only objection to RTC's motion to dismiss on June 15, 1993, stating that the court should not decide this motion to dismiss until the Tenth Circuit ruled on G-K's pending motion for rehearing. G-K's motion for rehearing has since been denied and the mandate issued June 25, 1993.

We hold that G-K lacks standing to appeal the bankruptcy court's order authorizing disbursement of the sale proceeds. G-K was merely an unsuccessful bidder for the Broadmoor property and not an "aggrieved person" as is required for standing to challenge the bankruptcy court's decision. G-K Development Co. v. Broadmoor Place Inv. et. al., Nos. 92-3043, 92-3048, 1993 WL 176520, at *2n.2 (10th Cir. May 21, 1993); Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989); In re HST Gathering Co., 125 B.R. 466, 468 (Bankr. W.D. Tex. 1991). Moreover, given the Tenth Circuit's ruling affirming the bankruptcy court's order authorizing the sale, we see no merit in G-K's challenge to the disbursement of the proceeds from that sale. The Tenth Circuit noted that without a stay pending appeal, a reversal

or modification on appeal of an authorization "of a sale or lease of property does not affect the validity of a sale" to a good faith purchaser. G-K Development Co., 1993 WL 176520, at *2n.3 (citing 11 U.S.C. § 363(m)). If G-K had no basis for challenging the validity of the sale, we find no basis for G-K's present challenge to the disbursement of the proceeds from that sale. Accordingly, we would affirm the bankruptcy court's order approving the disbursement of the proceeds from the sale on the merits.

IT IS THEREFORE ORDERED that appellee's motion to dismiss (Doc. #2) is granted and this appeal is dismissed.

Dated this 15th day of July, 1993 at Kansas City, Kansas.

/s/ (Earl E. O'Connor)
EARL E. O'CONNOR
United States District Judge

Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

No. 93-464

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.
Petitioner,

vs.

BROADMOOR PLACE INVESTMENTS, L.P., et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT FORREST L. ROBINSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 31, 1989 Broadmoor Place Investments, L.P., a Kansas limited partnership (hereinafter "Debtor"), filed a voluntary petition under title 11, chapter 11, United States Code, in the United States Bankruptcy Court for the District of Kansas. The Debtor owned a single asset, an office building located in Mission, Kansas known as Broadmoor Place. When Debtor filed its Chapter 11 petition, it owed more than $9 million to Respondent Resolution Trust Corporation as Receiver of Blue Valley Federal Savings & Loan Association (hereinafter "RTC").

On June 19, 1990, petitioner G-K Development Company (hereinafter "G-K") submitted an offer for the sum of $5.3 million for the purchase of Debtor's office building. The purchase price was raised to $5.7 million in an Addendum to the offer submitted on July 18, 1990. The G-K offer was subject to financing and other contingencies. On August 7, 1990, respondent Forrest L. Robinson (hereinafter "Robinson") submitted an offer for the purchase of Debtor's office building in the amount of $5.5 million dollars. The Robinson offer was for cash, had no material contingencies, and provided for a $50,000 earnest money deposit. On August 8, 1990, Debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances with the bankruptcy court. Debtor's Application presented G-K's offer as the favored one. Notice was sent to all parties in interest on August 8, 1990 that the bankruptcy court would entertain the Debtor's motion to sell Broadmoor Place and that objections to the sale were to be filed by September 4, 1990, with the hearing to be held on September 10, 1990. This gave the interested parties one month to prepare for the hearing.

The hearing of September 10 was scheduled during the

bankruptcy court's regular week of hearings scheduled for less than ten minutes. When the clerk called the case, the attorney for the Debtor stated that this hearing could be lengthy. Thus the bankruptcy judge stated that he would put the matter on the "heel," and no objections were made. Mr. Ronald Gold, himself an attorney and president of G-K, was present at the beginning of the September 10 hearing, as was his attorney, Ms. Janice Stanton. Mr. Gold then left the hearing because of a business appointment without testifying or presenting evidence.

On September 10, 1990, after hearing the evidence presented by the parties, the Court approved the sale of real property to Robinson. The Court found that the Robinson offer was more advantageous to the bankrupt estate because it paid $50,000 in earnest money deposit and provided for fewer contingencies and a more immediate closing than the G-K offer.

On September 24, 1990, G-K filed its Motion for Reconsideration and Rehearing of Order Approving Sale of Property Free and Clear of Liens and Encumbrances. On October 11, 1990, after hearing the arguments of counsel, the bankruptcy court denied the motion of G-K for reconsideration of the court's order, finding that the evidence that G-K sought to present could have been presented on September 10, 1990, but for their own neglect. An Order to this effect was entered by the bankruptcy court on November 1, 1990. On November 6, 1990, G-K filed its Notice of Appeal and a Motion for Stay with the bankruptcy court. The bankruptcy court denied the Motion for Stay on November 19, 1990. G-K then filed a Motion for Stay with the United States District Court for the District of Kansas on November 27, 1990. No action was taken by G-K on the Motion for Stay, and the sale of the real property to Robinson took place on December 7, 1990.

On July 26, 1991, the bankruptcy court entered its

Supplemental Opinion to the November 1, 1990 Order on Motion of G K Development Company for Reconsideration (hereinafter "Supplemental Opinion"). The Supplemental Opinion added findings to the order of September 10, 1990 and the denial of G-K's Motion for Rehearing on November 1, 1990. G-K appealed the Supplemental Opinion on August 16, 1991.

On August 14, 1991, the district court entered its Memorandum and Order remanding the matter to the bankruptcy court for a determination of whether Robinson was a "good faith purchaser." On November 25, 1991, the bankruptcy court held a hearing, and on November 29, 1991, the bankruptcy court made an explicit finding that Robinson was a good faith purchaser under 11 U.S.C. §363(m). Despite Petitioner's contention that the bankruptcy court unfairly quashed all efforts of Petitioner for discovery from both the Debtor and Robinson, the bankruptcy court found that the record before the court was sufficient to make the determination that Robinson was a good faith purchaser. G-K appealed this finding to the district court.

The RTC moved to dismiss both of G-K's appeals as moot in accordance with 11 U.S.C. §363(m). The district court granted the RTC's motion and dismissed G-K's appeals by orders entered January 15, 1992 and February 12, 1992. The district court ruled that G-K's appeals were moot within the meaning of section 363(m) because the September 14, 1990 Order and the sale of Broadmoor Place were not stayed pending G-K's appeal, the sale closed on December 7, 1990, and Robinson was a good faith purchaser.

On February 13, 1992 and February 18, 1992, Notices of Appeal were filed from the district court orders to the United States Court of Appeals for the Tenth Circuit. Those cases were consolidated on appeal. On May 21, 1993, the Tenth Circuit affirmed the District Court's dismissal on the basis of mootness.

The court of appeals found that the record in the bankruptcy court failed to establish collusion between Robinson and the Debtor and demonstrated that the Debtor actually favored the G-K offer. On June 2, 1993 petitioner filed a Suggestion for Rehearing En Banc and Petition for Rehearing. The Tenth Circuit denied both the Petition for Rehearing and Suggestion for Rehearing En Banc on June 17, 1993.

Petitioner's statement of the case misstates several key facts. Petitioner asserts that it signed a "contract" and an addendum to that "contract" with Debtor. No contract was entered into between petitioner and Debtor; rather, petitioner's alleged contract was really an offer since it required bankruptcy court approval pursuant to 11 U.S.C. §363(b). Petitioner was merely an unsuccessful bidder at a bankruptcy sale and never had a "right" to purchase the office building, as such a "right" is not granted until approval of the sale by the bankruptcy court.

Note should also be made that petitioner's increase of its offer to $5.7 million was expressly conditional on the consummation of a lease with the Internal Revenue Service and that Debtor would have to pay the cost of tenant improvements for the space which approximated $250,000. Robinson's contract contained no such contingency. However, as per the Order of September 14, 1990, (see Appendix 12, Petition for Writ of Certiorari) Robinson, on September 11, 1990 accepted the IRS lease and assumed the tenant improvement obligations of $250,000. Therefore, the total consideration received by the Debtor's estate was greater under the Robinson offer than the amended offer of petitioner.

Petitioner further alleges that Debtor violated its written representation to petitioner not to enter into any other contract. Even if such a written representation could be interpreted to prohibit petitioner from entering into any other contract, the

G-K offer was subject to bankruptcy court approval and thus the written representation was ineffective because the bankruptcy court did not approve the G-K offer.

Petitioner also misstates that when Debtor filed its application for approval of sale with the bankruptcy court, Debtor did not seek approval of a specific contract but instead asked the court to approve either petitioner's or Robinson's contract. Paragraph 6 of the Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances filed by the Debtor states that Debtor favors acceptance of the G-K offer. See Appendix 4, Petition for Writ of Certiorari. Debtor informed Mr. Robinson that his offer was regarded as a back-up to G-K's. Debtor presented both offers to the bankruptcy court in order to provide interested parties an opportunity to offer recommendations for consideration by the court. See Appendix 7, Petition for Writ of Certiorari.

In its Petition for Writ of Certiorari, petitioner stresses that Debtor did not disclose Robinson's partner in its Application and Notice of Hearing. The bankruptcy court in its Order dated December 7, 1990 approving the sale specifically found that adequate and sufficient notice and opportunity for hearing were given in connection with the Application and that the notice and the opportunity to be heard satisfied in all respects 11 U.S.C. §§102(1)(a) and 363, and Federal Rules of Bankruptcy Procedure 2002 and 4001.

SUMMARY OF ARGUMENT

Petitioner alleges in its Petition for Writ of Certiorari that the circuit courts of appeals are divided on the issue of whether an appeal is moot under 11 U.S.C. §363(m) where a stay order has not been obtained. The Tenth Circuit does not recognize any

exceptions to the general rule that absent a stay, upon completion of a sale to a good faith purchaser, the court must dismiss a pending appeal as moot. While four circuit courts have adopted limited exceptions to section §363(m), none of these exceptions would apply to this case even if it were brought in one of those circuits.

Petitioner G-K was accorded a full and fair hearing by the bankruptcy court concerning its offer to purchase Broadmoor Place. All relevant facts concerning petitioner's offer and Robinson's offer and the status of Robinson as a good faith purchaser were presented to the bankruptcy court and appear in the record. The bankruptcy court determined that the Robinson offer was more favorable to the bankruptcy estate because the Robinson offer was for cash, had no material contingencies, and provided for a $50,000 earnest money deposit. The only creditor receiving proceeds from the sale supported the bankruptcy court's determination. Petitioner has no standing to appeal the orders of the bankruptcy court, the district court or the Tenth Circuit, and its appeals are moot.

Throughout its Petition, petitioner asserts that the Tenth Circuit decision conflicts with several United States Supreme Court and lower court decisions. The facts at bar are readily distinguishable from the United States Supreme Court decisions relied upon by petitioner, and the existence of a conflict between the Tenth Circuit decision and lower court decisions does not present a valid basis for granting certiorari. Petitioner has not set forth special and important reasons why this Court should review the Tenth Circuit decision. Therefore, pursuant to Supreme Court Rule 16, the Petition for Writ of Certiorari should be denied and the order of the United States Court of Appeals for the Tenth Circuit should remain undisturbed.

ARGUMENT

I. PETITIONER, A MERE UNSUCCESSFUL BIDDER, HAS NO STANDING TO APPEAL THE BANKRUPTCY COURT APPROVAL OF THE SALE OF THE BROADMOOR PLACE TO RESPONDENT ROBINSON.

G-K has no standing to appeal the September 14, 1990 Order because G-K is nothing more than an unsuccessful bidder for Broadmoor Place. "Standing may be raised at anytime in the judicial process." ANR Pipeline Co. v. Corporation Commission of State of Oklahoma, 860 F.2d 1571, 1578 (10th Cir. 1988), cert. denied, 490 U.S. 1051 (1989). The right to appellate review in bankruptcy cases is restricted to "'persons aggrieved,' i.e. to those persons whose rights and interests are 'directly and adversely affected pecuniarily' by the decree or order of the bankruptcy court." Holmes v. Silver Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989).

A bidder at a bankruptcy sale is a stranger to the bankruptcy estate and has no rights or interest at stake, save the business opportunity he seeks. If his bid is rejected and a competing bid is approved, the unsuccessful bidder will suffer no pecuniary injury. He will simply miss out on a business opportunity. Accordingly, an unsuccessful bidder at a bankruptcy sale has no standing to object to, and no standing to appeal a Bankruptcy Court's rejection of his bid and approval of a competing bid. In re HST Gathering Co., 125 B.R. 466, 468 (W.D. Tex. 1991) (unsuccessful bidder's Application for Leave to Appeal denied for lack of standing); In re Planned Systems, Inc., 82 B.R. 919, 922 (Bankr. S.D. Ohio 1988) ("normally a frustrated bidder lacks standing to object to a sale of property"); In re Nepsco, Inc., 36 B.R. 25, 26-27 (Bankr. D. Me. 1983) (prospective bidder has no standing to object to bankruptcy sale); see also Big Shanty

Land Corp. v. Comer Properties, Inc., 61 B.R. 272, 277 (N.D. Ga. 1985) (bidder has no standing to appeal denial of motion for pre-confirmation sale of chapter 11 debtor's only asset).

G-K claims that it is more than an unsuccessful bidder because it had a "right" to purchase Broadmoor Place. G-K made the first offer for Broadmoor Place, and G-K claims that the Debtor accepted that offer. Neither the offer nor the acceptance could rule out competing offers. Freehill v. Greenfelder, 204 F.2d 907, 909 (2d Cir. 1953) ("the question at bar therefore comes down to whether the contract should be read to contain the implied condition that the 'approval of the court' meant an approval without exposing the property to the public bidding for a better price. We can see no basis for such an interpolation.") Rather than ruling out competing offers, G-K's offer and Debtor's acceptance engaged the bankruptcy court's power to permit and entertain competing offers for Broadmoor Place. In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989) (bankruptcy court may provide for competitive bidding to maximize estate and to protect creditors).

Only after the bankruptcy court approved Robinson's offer and rejected G-K's offer did anyone have a right to purchase Broadmoor Place: "(T)here is simply no contract without Bankruptcy Court approval." In re Landscape Properties, Inc., 100 B.R. 445, 447 (Bankr. E.D. Ark. 1988).

II. THE DISTRICT COURT, UPON RECEIPT OF THE BANKRUPTCY COURT'S DETERMINATION THAT RESPONDENT ROBINSON WAS A GOOD FAITH PURCHASER, PROPERLY DISMISSED PETITIONER'S APPEAL AS MOOT; THIS DISMISSAL WAS AFFIRMED BY THE TENTH CIRCUIT'S DECISION.

On January 15, 1992 and February 12, 1992, the district

court dismissed G-K's appeals because Robinson was a good faith purchaser, the bankruptcy court's authorization of the sale of Broadmoor Place to Robinson was never stayed, the sale was never stayed, and the sale closed on December 7, 1990.

Rule 7062 of the Federal Rules of Bankruptcy Procedure, made applicable by Rule 9014 of the Federal Rules of Bankruptcy Procedure, provides that an order approving sale of property under 11 U.S.C. §363 becomes effective immediately unless stayed. Additionally, Rule 8005 of the Federal Rules of Bankruptcy Procedure generally requires the filing of a supersedeas bond pending appeal of a bankruptcy sale. These provisions for stay and supersedeas bond encourage participation in bankruptcy sales by protecting good faith purchasers, upholding the finality of bankruptcy sales, and discouraging appeals. See In re Andy Frain Services, Inc., 798 F.2d 1113, 1125 (7th Cir. 1986). These purposes would be defeated if an appellant could challenge specific terms of a bankruptcy sale without obtaining stay and posting a supersedeas bond. An unsuccessful bidder would then have a cheap and easy way to inject risk and uncertainty into bankruptcy sale procedures, and the risk and uncertainty would necessarily discourage participation in bankruptcy sales. Section 363(m) of the Bankruptcy Code, 11 U.S.C. §363(m), therefore precludes appellate review of any term of a bankruptcy sale when the appellant fails to obtain a stay and post a supersedeas bond: "... Given the important role that section 363(m) plays in assuring a good faith purchaser at a bankruptcy sale good title, we find that the sale, including all of its terms, cannot be challenged on appeal when the appellant fails to obtain a stay." In re Andy Frain Services, Inc., 798 F.2d at 1127.

There is no reason for distinguishing between appellate review of specific terms of a bankruptcy sale and appellate

review of a finding that a bankruptcy sale was made to a good faith purchaser. If appellate review of the former depends on a stay and supersedeas bond, appellate review of the latter must also depend on a stay and supersedeas bond. Section 363(m) precludes appellate review of the bankruptcy court's finding that Robinson was a good faith purchaser because the bankruptcy court's approval of the sale of Broadmoor Place to Robinson was not stayed pending appeal.

This appeal is moot notwithstanding the motion for stay filed by G-K. The last clause of section 363(m) required G-K to preserve the status quo by obtaining a stay of the bankruptcy court's authorization of the sale of Broadmoor Place to Robinson and a stay of the sale. The sale closed on December 7, 1990. The stay motion was filed before that date. The stay motion was defective in two respects. First, the stay motion did not request a stay of the sale. Second, the stay motion failed to comply with Federal Rules of Bankruptcy Procedure 8011(d) because G-K failed to designate it as an "emergency motion "and G-K failed to file an affidavit that stated the nature of the "emergency."[1]

Neither the bankruptcy court's approval of the sale of Broadmoor Place to Robinson, nor the sale itself was stayed pending G-K's appeal. The sale closed on December 7, 1990, and Robinson was a good faith purchaser; thus, this appeal is moot within the meaning of 11 U.S.C. §363(m).

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[1]D. Kan. Rule 206(b) allowed ten days for a response to the Stay Motion. G-K did not request a reduction of the ten day period, Bankruptcy Rule 9006(c)(1), and G-K did not request a hearing date. G-K thus took the risk that the District Court would not learn of the Stay Motion until the time for filing a response had expired and the sale had closed.

III. THERE EXISTS NO CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT AND THE DECISIONS OF OTHER CIRCUIT COURTS REGARDING WHETHER AN APPEAL IS MOOT UNDER 11 U.S.C. §363(m) WHERE A STAY ORDER HAS NOT BEEN OBTAINED, THE SALE OF PROPERTY HAS OCCURRED, AND THE PURCHASER WAS A GOOD FAITH PURCHASER.

None of the mootness exceptions relied upon by petitioner are applicable to the instant case. In re Abbott Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir. 1986), was an appeal by a creditor and bidder of the bankruptcy court order confirming sale of the debtors' assets to a purchaser after an auction. The court in Abbott held that the appeals were not moot because no finding of good faith as to the purchaser's behavior had been made by the bankruptcy court. In the present case, an explicit finding was made by the bankruptcy court that Robinson was a good faith purchaser in a private sale.

Petitioner relies on Abbott for the propositions that exceptions to mootness exist if (1) a bankruptcy court refuses to hear evidence on the issue of collusion; (2) a bankruptcy court receives no evidence on the issue of value of the debtor's assets to be sold; and (3) a district court dismisses an appeal as moot prior to reviewing the record on appeal. In the present case, the bankruptcy court did not refuse to hear evidence on this issue of collusion between debtor and purchaser; rather it was Mr. Gold, president of G-K Development and petitioner, who refused to attend the September 10, 1991 hearing and present evidence. The second exception is inapplicable since value of the Debtor's asset has not been an issue in the present case, and the only creditor who would have received money from the transaction consented to the sale to Robinson.

The record on appeal referenced in Abbott refers to an "emergency" hearing in the bankruptcy court; it is this emergency hearing record that the Third Circuit held should have been reviewed by the district court. See Abbott, 788 F.2d at 149. In the present case, there was no "emergency" hearing at the bankruptcy court. The district court had an opportunity to review the record on appeal, and after such review, properly granted the Motion to Dismiss based on mootness. None of the exceptions raised in Abbott are applicable to the facts in this case. No conflict exists between the Third Circuit and the Tenth Circuit on the issue of whether an appeal is moot under the present facts.

Petitioner asserts that if state law otherwise provides the basis for remedy, the purchaser is on notice and the appeal is not moot. Matter of Sullivan Century Plaza I, Ltd., 914 F.2d 731, 734 (5th Cir. 1990). Sullivan is an appeal from a bankruptcy court order granting a creditor relief from stay and withdrawing an injunction subsequently granted to the debtor as moot after the creditor foreclosed and purchased the property in question. The court states that "if the State law otherwise provides the basis for a remedy, the purchaser is on notice and the appeal is not moot." Id. at 734. Petitioner, in the instant case, has failed to assert other state law which provides the basis for a remedy. The public interest in expediting and finalizing bankruptcy sales encourages buyers to purchase the bankruptcy property; without mention of an alternative basis for a remedy, petitioner has not set forth any realistic interest which overrides the creditors' and public's interest in facilitating the bankruptcy process. There exists no conflict between the Fifth Circuit and the Tenth Circuit on the issue of whether an appeal is moot under 11 U.S.C. §363(m) as applied to the facts at bar.

Petitioner contends that a party has a right of appeal to review whether or not the finding of the bankruptcy court on the

issue of good faith purchaser under 11 U.S.C. §364(e) is erroneous. In the Matter of EDC Holding Co., 676 F.2d 945 (7th Cir. 1982). In EDC, the United States District Court dismissed as moot an appeal by a creditors' committee from the bankruptcy judge's approval of a loan to the bankrupt which involved a grant of special priority to the lender. The facts of EDC are readily distinguishable from those of the case at bar, in that EDC concerns a loan to a bankruptcy debtor by a bank which received special priority despite the fact that it knew of objections to its receiving priority with regard to portions of the loan. The Seventh Circuit held that since the stated purpose of using a portion of the loan to pay legal expenses was improper, the party had a right to appeal the bankruptcy court's finding on the issue of good faith lender. Id. at 947. The Court specifically stated that "... knowledge of the pendency of an appeal from a bankruptcy judge's order granting a lender special priority does not forfeit the protections that the statute gives to a lender who is in good faith . . ." Id. The court in comparing the lending situation to a bankruptcy sale, explained that "[t]he proper recourse for the objecting creditors is to get the transaction stayed pending appeal." Id. In the instant case, Robinson was found to be a purchaser in good faith, and petitioner failed to get the transaction stayed.

The primary concern of the Court in EDC was the improper use of the bankruptcy estate and the resulting harm to the general creditors. Id. at 949. In the case at bar, there are no general creditors who will suffer, as the purchase price of Broadmoor Place does not even cover the amount owed to RTC. The RTC has at no time complained, and indeed, has supported the sale of Broadmoor Place to Robinson. Based on the facts and the lack of evidence of bad faith, the Seventh Circuit is not in conflict with the Tenth Circuit on the issue of whether an appeal is moot

under 11 U.S.C. §363(m).

The Ninth Circuit recognizes two exceptions to the mootness rule: (1) where real property is sold to a creditor subject to the right of redemption; and (2) where state law would otherwise permit the transaction to be set aside. In re Mann, 907 F.2d 923, 926 (9th Cir. 1990). The first exception is clearly irrelevant to the facts at issue. Regarding the second exception, there is simply nothing in the records indicating that the transaction could be set aside. In Mann, the appellant claimed that the 1.5 million dollars received for bankrupt property was grossly inadequate and that there was evidence of irregularity and unfairness surrounding the sale. Id. at 927. The court of appeals held that there was no basis for setting aside the foreclosure sale and the appeal of the sale was moot. Id. at 928. In the present case, there exists no indication of inadequate price or any evidence of irregularity or unfairness surrounding the sale to Robinson. While petitioner may argue that its offer should have been accepted due to its higher price, the bankruptcy court explicitly stated that it preferred Robinson's offer because it provided a $50,000 earnest money deposit, fewer contingencies and a more immediate closing than G-K's offer. Given that neither of the two exceptions to mootness recognized by the Ninth Circuit are applicable to the facts at bar, the Ninth Circuit does not conflict with the Tenth Circuit on the issue of whether an appeal is moot under 11 U.S.C. §363(m) as applied to the facts at bar.

Petitioner further contends that the Tenth Circuit's decision applying existing case law is in direct conflict with the Seventh Circuit's decision in Bastion v. Lake Front Realty Corp., 581 F.2d 685 (7th Cir. 1978). Bastion is a fact specific holding concerning securities laws; it does not involve the sale of property under 11 U.S.C. §363(m). Given the fact that Bastion

does not address a bankruptcy issue, there exists no direct conflict between the Tenth Circuit decision and the holding in Bastion.

Petitioner states that no circuit court of appeals in ruling on an appeal involving 11 U.S.C. §363(m) has recognized the additional exceptions to mootness that address (1) a court's failure to rule on a party's Motion for Stay; (2) where an appellant has taken all steps necessary to perfect the appeal and preserve the status quo; (3) where the underlying dispute between the parties is capable of repetition; and (4) where the trial court's order would have possible collateral legal consequences. The fact that no circuit court of appeals has recognized these additional exceptions to mootness is not sufficient ground to consider and grant writ of certiorari pursuant to Supreme Court Rules 10 and 16.

In summary, each case addressed by petitioner is easily distinguished from the facts at bar. The cases cited by petitioner do not illustrate a conflict between the circuit courts nor do they demonstrate any other basis for granting certiorari. To grant certiorari in the present case would hinder the objectives of Supreme Court Rule 10 which states that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor."

IV. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE PRINCIPLE THAT INTERESTS IN PROPERTY ARE DEFINED BY STATE LAW.

A. The Tenth Circuit decision does not conflict with this Court's holding in Butner v. United States, 440 U.S. 48 (1979).

Petitioner relies on Butner for the proposition that state law

applies to the determination of interest in property in bankruptcy proceedings. This Court granted certiorari in Butner in order to resolve whether reference to state law should be made in determining whether a security interest in property extends to rents and profits derived from the property. Butner, 440 U.S. at 52. The facts of Butner are not at all analogous with the facts at bar. Butner involves a dispute between a bankruptcy trustee and a second mortgagee concerning the right to the rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property. Id. at 49. Petitioner relies on a general assertion in Butner which states that Congress has left the determination of property rights in the assets of a bankrupt's estate to state law. Id. at 54. However, the Court held specifically in Butner that "the constitutional authority of Congress to establish, 'uniform laws on the subject of bankruptcy throughout the United States' would clearly encompass a federal statute defining the mortgagee's interests in the rents and profits earned by the property in the bankrupt estate. The Congress has not chosen to exercise its power to fashion any such rule." Id. In the present case, Congress has chosen to exercise its power to fashion 11 U.S.C. §363(m) which specifically states that an appeal is moot where a stay order has not been obtained, upon completion of a sale to a good faith purchaser. Thus the general proposition of Butner that state law applies to determinations of interest in property in bankruptcy proceedings is superseded by the specific language of 11 U.S.C. §363(m).

Petitioner again alleges in Section II A of the Petition that Robinson admitted knowledge that Debtor had executed a contract with petitioner for the purchase of Debtor's real property. It is urged that no such contract was executed given that no contract could exist prior to approval of the bankruptcy court. Petitioner was merely an unsuccessful bidder as explained in

Section I of this Brief in Opposition, and Robinson was at all times a "good faith purchaser."

The cases relied upon by petitioner in support of its proposition that Robinson is not a good faith purchaser are factually distinguishable from the present facts. In Hughes v. Cook, 232 P. 219 (Kan. 1925), the second purchaser of real estate had actual knowledge of the first purchaser's contract for sale. Similarly, Federal Savings & Loan Ins. Corp. v. Urschel, 157 P.2d 805 (Kan. 1945), supports the proposition that "one who has acquired a right or interest in real estate under an unrecorded contract may assert and maintain his right and interest therein even as against one who has subsequently purchased that real estate from the record owner if such subsequent purchaser had actual or implied notice of the right and interest possessed by the holder of the unrecorded instrument." Id. at 806. Finally, Urschel involves rights under a real estate contract and not a bankruptcy proceeding. The case at bar involves no contract rights nor does it address issues concerning the recording of real estate agreements.

Petitioner states that in Kansas, a party who signs a contract with the representative of an estate is bound to that contract and cannot withdraw without cause, citing Schul v. Clapp, 118 P.2d 570 (Kan. 1941). Robinson is unable to determine what part of the case petitioner is relying on for the above-stated principle. Petitioner relies on Camden v. Mayhew, 129 U.S. 73 (1889), for the proposition that this principle has been applied in bankruptcy; Robinson contends that this case law is inapplicable to the facts at bar. Petitioner asserts that both purchaser and debtor, upon execution of a contract, are bound until they are judicially relieved by the bankruptcy court. See Petition for Writ of Certiorari at 10, fn. 3. Because no contract existed prior to bankruptcy court approval of the sale, this argument is

inapplicable to the present case. Even assuming, in the alternative, that a contract were to be found, both petitioner and Debtor are no longer bound by such a "contract" because they were judicially relieved by the bankruptcy court through the bankruptcy court order approving sale to Robinson.

Petitioner alleges that the majority of circuits, in adopting the definition of good faith purchase set out in In re Rock Industry Machinery Corp., 572 F.2d 1195 (7th Cir. 1978), have created a federal common law of real property. The federal common law definition of good faith purchaser status does not conflict with the Kansas state real property standard which petitioner alleges should be applied to the facts at bar. Petitioner claims that Kansas has long defined "good faith purchaser" as one who purchases in good faith, for valuable consideration and without notice of the rights of other parties. Kruse v. Conklin, 108 P. 856 (Kan. 1910). The In re Rock definition describes the equitable principles of a good faith purchaser as one who buys in good faith, that is, free of any fraud, misconduct or collusion between the purchaser and other bidders or the debtor; for value; and without knowledge of any adverse claim. In re Rock, 572 F.2d at 1197-98. These definitions are virtually identical. Even if this Court were to find that state law applies to the present case, despite Robinson's belief that it does not, Robinson has fulfilled the requirements to be a good faith purchaser under Kansas law and the bankruptcy court has affirmed Robinson's status as a good faith purchaser. Petitioner has identified no conflict between the circuits nor has it shown a conflict with Kansas state real property law which it incorrectly alleges ought to be applied to the case. Lack of reference to Kansas real property principles by the Tenth Circuit does not justify the grant of certiorari by this Court.

B. Respondent Robinson did not receive a windfall by the happenstance of bankruptcy.

Petitioner relies upon Lewis v. Manufacturers National Bank, 364 U.S. 603, 706 (1961), for the proposition that Robinson may not receive a windfall by the happenstance of bankruptcy. Lewis involved a chattel mortgage that was not recorded until four days after its execution. Lewis held that the rights of creditors, whether they be existing or hypothetical, to which the trustee in bankruptcy succeeds are to be ascertained as of "the date of bankruptcy," i.e. when the petition of bankruptcy is filed. The Court's primary concern in Lewis was that it would inadvertently "enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy." Lewis, 364 U.S. at 608-09. The factual setting of Lewis is inapplicable to the facts at bar. In the present case, the purchase price of Broadmoor Place did not satisfy even the debt owed to RTC. Therefore the threat of a windfall enriching unsecured creditors does not exist as it did in Lewis. Robinson in no way received a windfall by the happenstance of bankruptcy. Robinson has been deemed a good faith purchaser in the bankruptcy court and would be so deemed in the Kansas state court as well; thus there exists no conflict between the Tenth Circuit's decision and the decision of this Court in Lewis.

C. Alleged conflict between the Tenth Circuit's decision and the decision of lower courts on the issue that, in bankruptcy, good faith purchaser status is determined by state law, is not a legitimate reason to grant certiorari pursuant to Supreme Court Rule 10; Robinson was a good faith purchaser.

Petitioner cites In re Flannery, 11 B.R. 974 (Bankr. E.D. Pa 1981) for the proposition that where a debtor executed two contracts for the sale of its sole real estate asset, approval of the

first contract was mandated because the second buyer could not qualify as a good faith purchaser due to his knowledge of the first contract. The court in Flannery stated that "since the agreement was executed prior to [defendants] agreement of sale, petitioners agreement should be approved by us absent any reason to hold to the contrary." (emphasis added) Id. at 977. In the instant case, the bankruptcy court expressly stated that approval of Robinson's offer was more beneficial than approval of petitioner's offer due to the $50,000.00 earnest deposit made by Robinson, the lack of other contingencies and the facilitation of an earlier closing. The bankruptcy court found these conditions worthy of extra consideration; its discretion should not be overruled in light of lower court decisions, such as Flannery, which petitioner improperly alleges are analogous to the instant case.

Furthermore, the bankruptcy court was correct in ruling that Robinson was a "good faith purchaser" pursuant to §363(m) of the Bankruptcy Code. While the Bankruptcy Code does not define "good faith purchaser", as used in §363(m), the courts have held that only fraud, collusion or obtaining grossly unfair advantage is sufficient to defeat the good faith status of a purchaser. See In re Rock, 572 F.2d at 1198. The purpose of the good faith purchaser requirement is to protect the creditors of the bankruptcy estate from sales of property for less than adequate value. In this case, RTC held a first priority secured claim against Broadmoor Place property in an amount far in excess of the price offered by Robinson or G-K. The only two parties affected by the sale are RTC and Carteret Savings & Loan, a participant in the loan to the Debtor. The most significant fact for this Court's consideration is that neither RTC nor Carteret objected to the sale. Indeed, RTC supported the offer of Robinson at the initial hearing in the matter primarily because the Robinson offer provided for a cash sale without contingencies. RTC and

Carteret continued to support the sale of the property to Robinson throughout the appellate process initiated by Mr. Gold and G-K. The governing principle in approving a sale is the securing of the best sale for the bankruptcy estate. See In re General Insecticide Co., 403 F.2d 629, 631 (2d Cir. 1968).

Thus the analogy to Flannery alleged by Petitioner is invalid on two bases; (1) Robinson was a good faith purchaser at all times, and (2) alternatively, in the event that a conflict does exist between the Tenth Circuit decision and that of the lower court, this Court is not the proper forum in which to address that conflict since it is not a conflict between two United States courts of appeal.

V. THE APPROVAL OF THE SALE OF THE BROADMOOR PLACE TO ROBINSON WAS A SOUND AND PROPER EXERCISE OF THE BANKRUPTCY COURT'S DISCRETION; THE ALLEGED CONFLICT OF THE TENTH CIRCUIT'S DECISION WITH DECISIONS OF LOWER COURTS IS NOT A VALID BASIS FOR THE GRANTING OF CERTIORARI.

The authorization for the sale of the Broadmoor Place was within the bankruptcy court's discretion. See, e.g., In re Martin Trigona, 760 F.2d 1334, 1346 (2d Cir. 1985) (". . . Judge Cabranes's . . . approval of the sale . . . was a proper exercise of his discretion . . ."); In re Vanguard Oil and Service Co., 88 B.R. 576, 581 (E.D.N.Y. 1988) ("it is within the discretion of the bankruptcy judge whether to approve a trustee's proposed sale of property of the estate."); In re Alves, 52 B.R. 353, 355 (Bankr. D.R.I. 1985) (same). The rejection of G-K's offer and the approval of Robinson's offer was a sound and proper exercise of the bankruptcy court's discretion. This is particularly true when the RTC opposed G-K's offer, supported Robinson's offer and

was entitled to 100% of the sale proceeds. See In re Martin-Trigona, 760 F.2d at 1346 ("even if we were to assume that through other efforts a purchaser would be obtained for the station who was willing to pay even double the Wardoco offer, Capital would still be entitled to receive all of the increase. Without evidence of any likelihood of the debtor's realizing any equity after the liquidation, it is difficult to envision any prejudice to either the debtor corporation or to Martin-Trigona, its sole Stockholder.").

Petitioner contends that the bankruptcy court was in error in having both the G-K and Robinson offers before it at the same time for consideration. Petitioner further asserts that by making a selection, the Court improperly participated in the administration of the bankrupt's estate, thereby performing a duty which the Bankruptcy Code of 1978 allocated to the trustee or debtor in possession. See In the Matter of Ohio Corrugating Co., 59 B.R. 11 (Bankr. N.D. Ohio 1985). In Ohio Corrugating, the debtor requested that the court choose between two competing bidders. This was not the case in the present situation, Debtor in the instant case sought approval of the sale of Broadmoor Place. In its May 21, 1991 judgment the Tenth Circuit stated that:

> While there is support for its position that a bankruptcy court cannot be presented with competing bids from which it is to choose, since that would involve it in an impermissible participation in the administration of a bankrupt's estate, we hold that a bankruptcy court in a case such as this does have the power to disapprove a proposed sale recommended by a trustee or debtor in possession if it has an awareness, there is another proposal in hand which, from the estate point of view, is better or more acceptable.

The Tenth Circuit, in this determination, relied on In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989), which stated that "in order to achieve the goals of maximizing the value of the

estate and protecting the interest of creditors, the court has plenary power to provide for competitive bidding."

Had the Debtor requested that the bankruptcy court make a choice between G-K and Robinson, this may have been an impermissible administrative act; however, the court used its own discretion in deciding to disapprove Debtor's recommendation that G-K be awarded the sale. Furthermore, Bankruptcy Rule 6005 is inapplicable to the instant case as the sale occurred through a private acquisition, and the bankruptcy court was never placed in the position to act as an auctioneer or appraiser. The discretion of the bankruptcy court was required to reach an equitable and just resolution, and the Tenth Circuit's decision should not be disrupted due to lower court decisions which are based on distinguishable facts.

VI. THE NOTICE OF THE SEPTEMBER 10, 1990 HEARING WAS PROPER IN ALL RESPECTS AND PETITIONER WAS GIVEN AN OPPORTUNITY TO PRESENT OBJECTIONS AFTER RECEIVING PROPER NOTICE.

G-K and all other interested parties received adequate notice of the hearing on the Application for Sale of the Property. Bankruptcy Rule 2002(c)(1) provides:

> Subject to Rule 6004 the notice of a proposed use sale or lease of property required by subdivision (a)(2) of this Rule Shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale or lease of property, including real estate, is sufficient if it generally describes the property.

The purpose of the notice is to provide ample opportunity for objections and hearing before the court if there are objections. In re Karpe, 84 B.R. 926, 930 (Bankr. M.D.Pa. 1988). The notice, however, need not include all the information which

would accompany a disclosure statement. In re Delaware & Hudson Ry. Co., 124 B.R. 169, 180 (D.Del. 1991).

The notice mailed by Debtor included the following information:

(a) a copy of the Application without exhibits;
(b) the date and time within which to file objections; and
(c) if objections were timely filed, the date, time and place for a hearing on the objections.

Debtor also mailed to each interested party the Application, which included a description of the property and copies of the G-K offer and Robinson offer, in full.

While the Robinson offer identified Robinson as the purchaser, it also provided that the contract was freely assignable and that it was subject to a continuing one year management contract with Broadmoor, Inc. It set forth all the terms and conditions of the sale of the property, including time to perform, earnest money deposit and purchase price, and a legal description of the real estate. Neither G-K nor its attorney filed a timely written objection to the Robinson offer or the form of notice. Lack of objection is especially noteworthy given that Mr. Gold, attorney of record on the present Petition and president of G-K, did not find it necessary to attend the majority of the September 10th hearing.

The bankruptcy court in its Order dated December 7, 1990, approving the Stipulation Regarding Sale, specifically found that adequate and sufficient notice and opportunity for hearing were given in connection with the Application and that the notice and opportunity to be heard satisfied in all respects 11 U.S.C. §363(m) and Bankruptcy Rule 2002.

Neither G-K nor its attorney objected to either the assignability clause or the management contract clause of the Robinson offer, either in writing or at the hearing. Neither G-K

nor its attorney objected on the record at the hearing regarding the assignment of the Robinson offer to a joint venture.

The bankruptcy court properly denied G-K's attempt to conduct discovery and introduce evidence on limited remand from the district court. Throughout the many motions, objections and maneuverings of G-K after September 10, 1990, the bankruptcy court consistently and correctly ruled that G-K was accorded a full and fair opportunity to present its evidence at the September 10, 1990 hearing. Mr. Gold had other matters which he deemed more important on that day.

G-K presents virtually the same arguments to this Court as it presented to the district court and the Tenth Circuit. Had the district court felt that a new trial was needed on remand, it could have so ordered a new trial. Instead, the district court merely remanded the case to the bankruptcy court to make a factual finding. The bankruptcy court was well within its discretion to make this finding on the evidence received at the original hearing.

Even if the bankruptcy court intended to conduct a new evidentiary hearing, G-K cannot conduct examinations under Bankruptcy Rule 2004(a) which provides:

> On motion of any party in interest, the court may order the examination of an entity. (emphasis added)

G-K is not a party in interest in the bankruptcy proceeding and does not have standing to request a Rule 2004 examination. While certain other means of discovery might have been available under Part IX of the Federal Rules of Bankruptcy Procedure, G-K did not choose to proceed in this manner.

There is no doubt that general due process standards apply in bankruptcy proceedings. G-K however apparently contends that due process entitles a party to two trials. There exists no case law requiring such a replication in trials.

VII. THE PRINCIPLE THAT FILING A NOTICE OF APPEAL CONFERS JURISDICTION ON THE APPELLATE COURT AND DIVESTS THE TRIAL COURT OF CONTROL OVER THOSE ASPECTS OF THE CASE INVOLVED IN THE APPEAL DOES NOT APPLY IN THE PRESENT CASE.

The Supplemental Opinion entered July 26, 1991 by the bankruptcy court, added additional findings to the original Order of November 1, 1990. In its Order on Motion for G-K Development Company for Reconsideration, of November 1, 1990, the bankruptcy court reserved the right to enter a written opinion upon appeal of its previous orders. While it is true that the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal, an exception to this general principle exists when the court's amendment did "not interfere with but instead facilitated review of the pending appeal . . .." Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 379 (1985). Marrese involved an appeal to the court of appeals from the district court, whereas the case at bar concerns an appeal to the district court from the bankruptcy court. Given that the Supplemental Opinion facilitated review of the pending appeal and that the courts at issue in Marrese are different from those involved in the present case, the Tenth Circuit's decision permitting reliance upon the Supplemental Opinion of the bankruptcy court is easily reconciled with this Court's prior opinion in Marrese.

CONCLUSION

Petitioner has not set forth special and important reasons why this Court should review the Tenth Circuit decision on Writ of Certiorari; the Tenth Circuit decision does not conflict with the decision of any other United States Court of Appeals on the same matter. Therefore, pursuant to Supreme Court Rule 16, respondent Robinson prays that the Petition for Writ of Certiorari be denied and the Order of the United States Court of Appeals for the Tenth Circuit remain undisturbed.

Respectfully submitted,

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(4)

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

G.K. DEVELOPMENT COMPANY, INC., PETITIONERS

v.

BROADMOOR PLACE INVESTMENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to a sale approved by the bankruptcy court is moot under 11 U.S.C. 363(m) because petitioner failed to obtain a stay of the sale to a good faith purchaser during the pendency of the appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-1 to 4-5) is reported at 994 F.2d 744. The orders of the district court (Pet. App. 5-1 to 5-2, 6-1 to 6-3) and the bankruptcy court (Pet. App. 7-1 to 7-4) are unreported. A related order of the district court (Pet. App. 8-1 to 8-2) and related orders and opinions of the bankruptcy court (Pet. App. 9-1 to 9-4, 10-1 to 10-2, 11-1 to 11-3, 12-1 to 12-2) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3-1 to 3-2) was entered on May 21, 1993. A petition for rehearing was denied on June 17, 1993. Pet. App. 1-1 to 1-2. The

petition for a writ of certiorari was filed on September 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the bankruptcy of respondent Broadmoor Place Investments, L.P. (Broadmoor), a partnership whose sole asset was an office building on which Blue Valley Federal Savings and Loan Association held a lien. The bankruptcy court approved a sale of the property to a party other than petitioner. The district court (Pet. App. 6-1 to 6-3) and the court of appeals (*id.* at 4-1 to 4-5) declined to invalidate the sale.

1. In October, 1989, Broadmoor filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. Broadmoor's sole asset was the Broadmoor Place office building in Mission, Kansas. During the summer of 1990, Broadmoor signed two separate agreements to sell the building, one to petitioner and one to Forrest L. Robinson. Because 11 U.S.C. 363 required bankruptcy court approval for any sale of the property, Broadmoor filed an application in the bankruptcy court on August 8, 1990, seeking approval of the agreement to sell the property to petitioner, but advising the court of the existence of the "back-up" agreement with Robinson. See Pet. App. 4-2 to 4-3, 7-2, 8-1 to 8-2, 9-1 to 9-2.

2. After a hearing, the bankruptcy court rejected the proposed sale to petitioner, but approved the proposed sale to Robinson, subject to a modification requiring Robinson to deposit $50,000 earnest money. Pet. App. 12-1 to 12-2. The court explained that although the Robinson agreement had a lower purchase price ($5.5 million, rather than the $5.7 million offered by petitioner), it had fewer contingencies and provided for a faster closing. *Id.* at 11-2, 12-2. Petitioner filed a motion for reconsider-

ation and a motion for a stay pending appeal, both of which the bankruptcy court denied. *Id.* at 10-1 to 10-2, 11-1 to 11-3.[1] In the absence of a stay, Robinson purchased the property on December 7, 1990. See *id.* at 4-3, 7-3, 8-2.

3. When petitioner appealed, Robinson and the RTC[2] argued that the appeal was moot, because the only relief petitioner sought was invalidation of the sale, and because 11 U.S.C. 363(m) provides that a decision of an appellate court overturning a bankruptcy court's authorization of a sale of property "does not affect the validity of a sale * * * under such authorization to an entity that purchased * * * such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale * * * were stayed pending appeal." The district court concluded that petitioner's "appeal will be deemed moot if Robinson is found to be a 'good faith purchaser,'" and remanded to the bankruptcy court for consideration of that question. Pet. App. 8-1 to 8-2.

4. On remand from the district court, the bankruptcy court concluded that Robinson was a good faith purchaser. Pet. App. 7-1 to 7-4. The court held that a "good faith purchaser" under Section 363(m) is one who purchases in "good faith" and "for value." Pet. App. 7-3. The court found that Robinson clearly purchased for value, delivering $5.5 million at the closing on December 7, 1990. *Ibid.* The court then explained that a purchaser was a good faith purchaser in the absence of "fraud, col-

[1] The bankruptcy court subsequently supplemented the opinion denying the motion for reconsideration. Pet. App. 9-1 to 9-4.

[2] In this brief, "RTC" refers to the Resolution Trust Corporation as receiver for Blue Valley Federal Savings and Loan Association.

lusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Ibid.* The court found no evidence of any such conduct, noting that the absence of collusion with the debtor was made particularly clear by the debtor's preference for the sale to petitioner over the sale to Robinson. *Ibid.*

5. The district court affirmed. Pet. App. 6-1 to 6-3. The court stated that the bankruptcy court's findings on the "good faith purchaser" question "were not clearly erroneous" and thus concluded that the appeal was moot "because no stay was entered and the property in question has been sold to a 'good faith purchaser.'" *Id.* at 6-2.[3]

6. The court of appeals affirmed. Pet. App. 4-1 to 4-5. The court first stated that petitioner had no standing to appeal, because it was "merely an unsuccessful bidder and not an 'aggrieved person' as is required [under Tenth Circuit precedent]." *Id.* at 4-4 n.2. In any event, the court explained, petitioner's appeal was meritless. The court rejected petitioner's argument that the bankruptcy court impermissibly participated in administration of the estate when it selected the contract with Robinson over the contract with petitioner, explaining that the court had "power to disapprove a proposed sale recommended by a trustee or debtor-in-possession if it has an awareness there is another proposal in hand which, from the estate's point of view, is better or more acceptable." *Id.* at 4-4.

The court also rejected petitioner's argument that Robinson was not a good faith purchaser because Robin-

[3] Petitioner filed two appeals from the bankruptcy court. A different judge in the United States District Court for the District of Kansas dismissed the second appeal in a brief order relying entirely on the order discussed in the text. Pet. App. 5-1 to 5-2.

son knew of petitioner's offer to purchase the property when Robinson submitted its offer; the court stated that petitioner's "proposal was a bid and not a contract," because it could not be binding on the debtor until the court approved it. Pet. App. 4-4. The court also noted that petitioner's argument that Robinson colluded with the debtor was "negated by the fact that [the debtor] proffered [petitioner's] bid as its first choice." *Id.* at 4-5. Finding "no basis to disturb the Bankruptcy Court's finding * * * that the Robinson transaction was in good faith and involved no fraud," the court affirmed the district court's order dismissing the appeal. *Ibid.*

ARGUMENT

Petitioner argues for a variety of reasons (Pet. 6-16) that the lower courts erred in not overturning the sale to Robinson. Whatever the merits of those arguments, they are not properly before the Court because petitioner offers no basis for overturning the court of appeals' alternative holding that petitioner had no standing to challenge the sale. Pet. App. 4-4 n.2.

The lower courts frequently have held that a third party, whose sole relation to a bankruptcy proceeding is that it bid to purchase property from a bankrupt estate, does not have standing to challenge a decision authorizing a sale to another party.[4] Those decisions rest on the

[4] See, *e.g.*, *Davis* v. *Seidler* (*In re HST Gathering Company*), 125 B.R. 466, 468 (W.D. Tex. 1991) (unsuccessful bidder's application for leave to appeal denied for lack of standing); *In re Planned Systems, Inc.*, 82 B.R. 919, 922 (Bankr. S.D. Ohio 1988) ("[N]ormally a frustrated bidder lacks standing to object to a sale of property."); *In re NEPSCO, Inc.*, 36 B.R. 25, 26-27 (Bankr. D. Me. 1983) (prospective bidder has no standing to object to bankruptcy sale); see also *Big Shanty Land Corporation* v. *Comer Properties, Inc.*, 61 B.R. 272, 277 (N.D. Ga. 1985) (bidder has no

premise that the provisions of the Bankruptcy Code requiring judicial approval of sales of property of the estate were enacted for the benefit of shareholders and creditors of the debtor, not for the benefit of third parties who wish to purchase assets from the estate. Because the lower court's ruling on that point is adequate by itself to support the judgment of the lower court, review by this Court would not alter the judgment of the court of appeals. The arguments presented in the petition are, in any event, without merit.

1. Petitioner's principal argument (Pet. 6-12) is that the court of appeals erroneously determined that the case is moot. That conclusion, however, follows directly from the language of the statute. The Bankruptcy Code provides that

> reversal or modification on appeal of an authorization * * * of a sale * * * of property does not affect the validity of a sale * * * under such authorization to an entity that purchased * * * such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale * * * were stayed pending appeal.

11 U.S.C. 363(m). The only action petitioner challenges is the bankruptcy court's authorization of the sale to Robinson. Because the sale pursuant to that authorization was not stayed pending appeal, the statute allows an appellate court's review of petitioner's challenge to the sale to have effect only if the purchaser did not purchase the property "in good faith."

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standing to appeal denial of motion for pre-confirmation sale of Chapter 11 debtor's only asset); *In re Rook Broadcasting, Inc.*, 154 B.R. 970, 974 (Bankr. D. Idaho 1993) (bidder has no standing to object to disclosure statement for plan).

Although petitioner argues (Pet. 9-12) that this Court should review the question whether Robinson was a good faith purchaser, it does not suggest that the courts of appeals have adopted different standards for resolving that question. Indeed, petitioner acknowledges (Pet. 10) that, like the court below, the lower courts generally "have adopted the traditional equitable principles of good faith purchaser that have been generally defined as one who buys in good faith, that is, free of any fraud, misconduct or collusion between the purchaser and other bidders or the debtor; for value; and without knowledge of any adverse claim." There is no need for this Court to review the bankruptcy court's reasonable application of the generally accepted standard in this case.

Petitioner also contends (Pet. 7-8) that there is a conflict in the courts of appeals about when appeals should be dismissed as moot under Section 363(m). It is plain, however, that none of the decisions on which petitioner relies are apposite. The Third Circuit's decision in *In re Abbotts Dairies, Inc.*, 788 F.2d 143, 147-150 (1986), held that an appeal was not moot because the bankruptcy court had not determined whether the purchase was made in good faith. In this case, of course, the bankruptcy court wrote a separate opinion resolving that question. Pet. App. 7-1 to 7-4. The decisions of the Fifth Circuit in *Sullivan Central Plaza, I, Ltd.* v. *BancBoston Real Estate Capital Corporation* (*In re Sullivan Central Plaza, I, Ltd.*), 914 F.2d 731, 734 (1990), and the Ninth Circuit in *Mann* v. *Alexander Dawson Inc.* (*In re Mann*), 907 F.2d 923, 926 (1990), merely state that Section 363(m) does not apply when an alternate means of recovering the property is available under state law. Those statements are not relevant here, where peti-

tioner has not relied on a state-law basis for recovery.[5] The Seventh Circuit's decision in *In re EDC Holding Company*, 676 F.2d 945, 947-948 (1982) (interpreting an analogous provision in 11 U.S.C. 364 that protects entities that extend credit to a debtor upon authorization of a bankruptcy court), holds that a party has a right to review of the bankruptcy court's findings on the question of good faith; petitioner received such review in this case, but the bankruptcy court's findings were affirmed. Finally, the Seventh Circuit's decision in *Bastian* v. *Lakefront Realty Corporation*, 581 F.2d 685 (1978), did not arise out of a bankruptcy proceeding and thus did not consider Section 363(m).

2. Petitioner presents three additional contentions: that the bankruptcy court improperly intruded into administration of the estate when it approved Robinson's bid rather than petitioner's (Pet. 12-14); that the bankruptcy court deprived petitioner of due process by giving inadequate notice of the hearing that resulted in the decision to approve Robinson's offer to purchase the property (Pet. 14-15); and that it was improper for the bankruptcy court to issue a supplemental opinion explaining its denial of petitioner's motion for reconsideration (Pet. 15-16). None of those contentions provides a basis for reversing the judgment of the court of appeals, which rests on the separate holdings that the appeal was

[5] Petitioner's argument (Pet. 9-12) that Robinson was not a good faith purchaser under Kansas law rests on the incorrect premise that petitioner had a binding contract to purchase the property. Because petitioner's agreement with the debtor was never approved by the bankruptcy court, it never ripened into a binding contract. Moreover, the argument does not suggest that the sale to Robinson under order of the bankruptcy court violated Kansas law or that Kansas law grants petitioner a separate right to recover the property from Robinson.

moot because of 11 U.S.C. 363(m) and that petitioner had no standing to challenge the sale. Accordingly, none of those contentions warrants review by this Court. In any event, the contentions are meritless.

a. Petitioner's argument (Pet. 12-14) that the bankruptcy court improperly intruded into administration of the estate rests on the premise that the debtor presented the court with competing offers and asked the court to choose between them. But as the court of appeals explained, that is not at all what transpired. Instead, the debtor filed an application asking the bankruptcy court to approve a sale to petitioner. The court, however, for reasons explained in its opinion (Pet. App. 12-2), rejected the proposed sale to petitioner. Because it was aware of another proposed disposition of the property—a sale to Robinson—it was entirely appropriate for the court to proceed to consider that disposition at the same hearing, while all the parties and their counsel were present.

b. Petitioner's argument (Pet. 14-15) that the bankruptcy court's notice of its September 10, 1990, hearing was so defective as to deprive petitioner of due process is specious. The notice was actually delivered to petitioner, and petitioner appeared with counsel at the hearing. Furthermore, the notice made it clear to petitioner that the purpose of the hearing was to consider the propriety of a sale to petitioner, as well as an alternative proposed sale to Robinson. As the bankruptcy court explained, the notice "gave the interested parties one month to prepare for the hearing." Pet. App. 9-4. The fact that petitioner "chose to wait until three days before the hearing to retain counsel" may have limited petitioner's preparation for the hearing, *ibid.*, but it does not establish a violation of the Due Process Clause.

Petitioner also suggests (Pet. 14) that the notice violated Bankruptcy Rule 2002(c)(1) because it did not disclose certain financial transactions of a partner of Robinson. Petitioner does not explain, however, why those transactions would have been relevant to the bankruptcy court's decision, which was concerned only with making the most profitable deal for the estate. In any event, the notice fully complied with Rule 2002(c)(1) (set out at Pet. App. 13-2), which requires only that the notice include "the terms and conditions of any private sale and the time fixed for filing objections." The matters about which petitioner complains were neither "terms" nor "conditions" of the sale.

c. Finally, petitioner argues (Pet. 15-16) that the bankruptcy court did not have the authority to issue a supplemental opinion explaining its denial of petitioner's motion for reconsideration of the order approving a sale of the property to Robinson.[6] It is difficult to see, however, how the bankruptcy court's order on the motion for reconsideration is relevant to the case as it now stands. Petitioner is challenging the bankruptcy court's decision to approve the sale to Robinson; there is no reason to believe that the reiteration of the bankruptcy court's views in its supplemental opinion had the slightest effect on the review by the district court and the court of appeals of the bankruptcy court's original order.[7]

In any event, the bankruptcy court's decision to supplement its original explanation of why it denied petitioner's motion for reconsideration was entirely proper. This is not a case where a court attempted to alter an

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[6] The original opinion appears at Pet. App. 11-1 to 11-3. The supplemental opinion appears at Pet. App. 9-1 to 9-4.

[7] None of the opinions of the district court or the court of appeals refers to the supplemental opinion.

order that already had been appealed to an appellate court. Rather, the bankruptcy court simply issued a more detailed explanation of its earlier decision for the purpose of aiding appellate review of that decision. None of the cases cited by petitioner casts doubt on the validity of that practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993

FILED
DEC 27 1993
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(5)

No. 93-464

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.,
Petitioner,

vs.

BROADMOOR PLACE INVESTMENTS, L.P. et al.,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. AS STATED BY THIS COURT IN BUTNER V. UNITED STATES, 440 U.S. 48 (1979), CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS ON THE PROPER INTERPRETATION OF FEDERAL STATUTES GOVERNING THE ADMINISTRATION OF BANKRUPTCY ESTATES.

Federal Respondent, representing Resolution Trust Corporation ("RTC"), and Respondent Robinson ("Robinson") acknowledge that the Tenth Circuit decision conflicts directly with other circuit courts on whether appellate exceptions to mootness exist under 11 U.S.C. § 363(m) and argue only that the exceptions cited by Petitioner are not applicable (Rob-Br, 5-6). The Tenth Circuit's decision specifically stated it was not addressing the issue of exception to mootness and affirmed a dismissal by the District Court on the basis of mootness (Writ, App. 4-5). This Court granted certiorari in Butner to resolve a conflict between the circuit courts on whether state law applies to a security interest in property or a federal rule of equity. The Tenth Circuit's decision involves the broader concept of whether a party has a right to appeal, under 11 U.S.C. § 363(m), the sale of bankruptcy assets.

The Fifth Circuit in Matter of Sullivan Cent. Plaza I, Ltd., 914 F.2d 731 (5th Cir., 1990) and the Ninth Circuit in In re Mann, 907 F.2d 923 (9th Cir., 1990), both recognize an exception to mootness where state law permits a remedy, which is not recognized by the Tenth Circuit. The RTC incomprehensibly argues, in its Brief (RTC-Br, 7-8), that Petitioner has not relied on a state-law basis for recovery, that the sale to Robinson did not violate Kansas law and that Kansas law does not grant Petitioner a right to recover the property from Robinson. Robinson, throughout these proceedings, admits that he had prior knowledge that the Debtor executed a contract with Petitioner. Such knowledge denies Robinson good

faith purchaser status in Kansas. Hughes v. Cook, 232 P. 219 (1925). Kansas law provides Petitioner relief by requiring Robinson to reconvey the property to it as the initial good faith purchaser. Federal Savings and Loan Ins. Corporation v. Urschel, 157 P.2d 805 (1945).

Respondents misinterpret the Seventh Circuit's decision in In the Matter of EDC Holding Co., 676 F.2d 945 (7th Cir., 1982). The Seventh Circuit permits an appeal to determine whether the decision of a bankruptcy court on the issue of good faith lender or purchaser is erroneous without obtaining a stay order; the Tenth Circuit's decision, which invokes mootness, does not.

Robinson and RTC misstate the factual record of the Tenth Circuit's decision to distinguish it from the exceptions to mootness as found by the Third Circuit in In re Abbott's Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir., 1986). The facts in Abbott's and the Tenth Circuit's decision are almost identical. There is a conflict as the Tenth Circuit does not recognize exceptions to mootness: (a) The Third Circuit entered an Order of remand to the bankruptcy court to conduct an evidentiary hearing on the issue of collusion between the debtor and purchaser, the Tenth Circuit, invoking mootness, affirmed a remand where the Bankruptcy Court refused to conduct an evidentiary hearing on the issue of collusion[1] and refused to allow the introduction of documentary evidence[2]; (b) the Third Circuit remanded because of the District

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[1]Robinson argues (Rob-Br, 11) that at the hearing of September 10, 1990, Petitioner did not present evidence of collusion between Robinson and the debtor's general partner on the undisclosed management agreement. No evidence of collusion was presented in September, 1990 as Petitioner first learned of the collusion in December, 1990 and filed an Affidavit with the District Court.

[2]The refusal of the Tenth Circuit to allow an evidentiary hearing on collusion resulted in misidentification of the parties in collusion. The decision specifically references the collusion between Broadmoor (Debtor) and Robinson (Writ, App. 4-5). The collusion was between Robinson and Broadmoor, Inc. (Rob-Br, 24). There was never disclosure that Broadmoor, Inc., was owned by the Debtor's general partner and Robinson was paying him $170,000.00.

Court dismissing an appeal as moot prior to receiving the record, the Tenth Circuit, invoking mootness, affirmed the District Court's dismissing the appeal in the instant case as moot prior to receiving the record on appeal; (c) the Third Circuit remanded as the Bankruptcy Court based value of the debtor's assets on a contract price rather than an appraised value of 75%, the Tenth Circuit, invoking mootness, affirmed the Bankruptcy Court's finding of value from the purchase price in Robinson's contract.

There is a direct conflict between the circuits on the appellate mootness rule under 11 U.S.C. § 363(m). This conflict in statutory interpretation should be resolved by this Court.

II. THIS COURT'S DECISION IN BUTNER V. UNITED STATES, 440 U.S. 48 (1979), PROHIBITS THE USE OF A FEDERAL COMMON LAW OF EQUITY TO DETERMINE PROPERTY RIGHTS IN BANKRUPTCY.

The RTC agrees with Petitioner that the circuit courts have adopted a federal common law of equity based upon traditional concepts of good faith purchaser (Writ, 10, RTC-Br. 7) as 11 U.S.C. § 363(m) does not define "good faith purchaser." See also § 5:59 Bankruptcy Service, L.Ed. 78 (1990). This court, in Butner, held that "undefined considerations of equity provide no basis for adoption of a uniform federal rule. . .", Id. at 56. Robinson argues that the principle of state law in Butner is superseded by 11 U.S.C. § 363(m). Robinson's position is erroneous because of the absence of a definition of good faith purchaser in 11 U.S.C. § 363(m), which raises a required presumption that Congress left the determination of property rights in estate assets to state law. Nobleman v. American Savings Bank, ____ U.S. ____, 113 S.Ct. 2106, 2108 (1993) *citing Butner, Id., at 54-55.* Circuit courts have uniformly followed Butner by interpreting the undefined term "bona fide purchaser of real property" in 11 U.S.C. § 544 (a)(3) according to state real property law standards. Watkins v. Watkins,

922 F.2d 513 (10th Cir., 1991), In re Konowitz, 905 F.2d 55 (4th Cir., 1990) and In re Ward, 837 F.2d 124 (3rd Cir., 1988).

The Respondents rely heavily on the Tenth Circuit's decision that the Debtor could execute a second contract with Robinson on the basis that Petitioner's contract was merely an offer/bid and not binding on the Debtor. There is no citation to bankruptcy authority to support this federal common law theory. The Tenth Circuit's decision conflicts directly with precedence established by this Court and bankruptcy authority that a purchaser is bound to his bid prior to confirmation, Camden v. Mayhew, 129 U.S. 73 (1889), and that both Debtor and Petitioner are bound to their contract until judicially relieved by the Bankruptcy Court. 4B Collier on Bankruptcy § 70.98 ([16] at 1173-1174) (14th Ed., 1978). An accepted bid, even though subject to confirmation, is considered a contract concluded between the parties. Freehill v. Greenfeld, 204 F.2d 907, 908 (2nd Cir., 1953); Frazier v. Ash, 234 F.2d 320 (5th Cir., 1956).

There is no bankruptcy statute or rule that authorizes a debtor to execute two contracts for the sale of a real property asset. Absent such a statute, Butner and Nobleman mandate that state property law standards apply. As the debtor in possession, the Debtor has the power to bind the bankruptcy estate subject to court approval, Lincoln National Life v. Scales, 62 F.2d 582 (5th Cir., 1933), the Debtor could not execute a second contract until after a confirmation hearing on Petitioner's contract. Robinson's prior knowledge of Petitioner's contract denies him good faith purchaser status under Kansas law, which is applicable to the sale of real property in bankruptcy. In re Flannery, 11 B.R. 974 (Bankr. E.D. Penn., 1981).

III. PETITIONER HAS STANDING TO APPEAL THE BANKRUPTCY COURT'S ORDERS AS ITS RIGHTS WERE IMPAIRED BY THE INTRINSIC STRUCTURE OF THE BANKRUPTCY SALE.

The RTC and Robinson[3] (RTC-Br, 7; Rob-Br, 7) argue that Petitioner has no standing to appeal the Bankruptcy Court's Order as it is an "unsuccessful bidder." Robinson, interestingly, cites (Rob-Br, 23) In re Karpe, 84 B.R. 926 (Bankr. M.D. Penn. 1988), which denied standing to a second party like Robinson. In Karpe, a second bidder/purchaser tried to obtain standing to make an offer where the debtor in possession had signed a private sales agreement with a first purchaser. The bankruptcy court held the second purchaser had no standing as it was not a party in interest. Robinson and the RTC cite no circuit court authority that an "unsuccessful bidder" under 11 U.S.C. § 363(m) lacks standing to appeal; to the contrary, the Third Circuit, in Abbott's, supra, gave standing to an "unsuccessful bidder" which resulted in the bankruptcy court's order being reversed for violation of bankruptcy procedure and law. The circuit courts, in pre-Code cases, grant standing to an unsuccessful bidder who "attacks a bankruptcy sale on equitable grounds related to the intrinsic structure of the sale"[4] as the bidder brings himself within the zone of interest which the Bankruptcy Act seeks to protect and to regulate. In re Harwald Co., 497 F.2d 443, 444-445 (7th Cir., 1974) *citing Mason v. Ashbeck, 383 F.2d 779 (10th Cir., 1967)*; In re Time Sales Finance Corp., 445 F.2d 385 (3rd Cir., 1971) (by implication).

The presently applicable Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, et seq., does not contain any express limitation on appellate standing. Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir., 1989) (citing § 39(c) of the Bankruptcy Act of 1898). The use of the word "person" in § 39(c) is less strict than the word "party" in § 25 of the Act. 1 Collier on Bankruptcy,

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[3]Robinson (Rob-Br, 7) misstates Petitioner's claim for relief which was correctly stated by the Tenth Circuit (Writ, App. 4-4).

[4]The Third Circuit aptly terms such structure as an opportunity for skulduggery, Abbott's, Id. at 149 (citation omitted).

¶3.03 at 180, 181 (15th Ed., 1990). In order to appeal a bankruptcy court's order, a litigant must qualify as a "person aggrieved" by the order. A "person aggrieved" by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens or impairs the person's rights. Matter of Andreuccetti, 975 F.2d 413, 416 (7th Cir., 1992), *citing In re Fondiller, 707 F.2d 441, 442 (9th Cir., 1983)*. Petitioner has standing to appeal the Bankruptcy Court's Orders (Writ, App. 8, 12) as its rights were impaired by a lack of prior notice and a hearing. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). Petitioner, throughout its Petition for Writ of Certiorari and this reply, has outlined its rights that were impaired by the Bankruptcy Court's Orders. Petitioner's rights were impaired to the same extent as the "unsuccessful bidder" appellant's rights in Abbott's, supra, as described in Section I of this Reply Brief.

The term "unsuccessful bidder" derives from the pre-Code preferred statutory method of sale, the public auction. Petitioner's relationship with the Debtor was not from a public auction, but from a private sales agreement as authorized by Bankruptcy Rule 6004(e)(1)[5] adopted for the first time in the Bankruptcy Reform Act of 1978. If the term "unsuccessful bidder" is applicable to post-1978 transactions, then Petitioner would be the "successful bidder" as its bid/offer was first accepted by the Debtor. A successful bidder deprived of his bid by a referee's order can maintain an appeal in his own name and does not have to seek review in the name of the trustee. Castaner v. Mora, 234 F.2d 710, 715 n.3 (1st Cir., 1956).

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[5]Conduct of sale not in the ordinary course of business.

1. *Public or Private Sale.* All sales not in the ordinary course of business may be private or by public auction. . . .

IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN MARRESE V. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, 470 U.S. 373 (1985), AS THE BANKRUPTCY COURT'S SUPPLEMENTAL OPINION WAS NOT ENTERED FOR THE PURPOSE OF FACILITATING REVIEW.

Robinson argues (Rob-Br, 26) that the Supplemental Opinion of the Bankruptcy Court (Writ, App. 9) falls within an "exception to facilitate review" that he interprets from this Court's decision in Marrese, Id. There is no such exception in Marrese. Marrese involved two separate appeals on two separate issues. This Court found that the District Court, by exercising jurisdiction on two separate matters, facilitated review on appeal. In the Tenth Circuit's decision, the Bankruptcy Court's supplemental opinion was not on a separate issue but related to the primary issue on appeal - the good faith purchaser status of Robinson. Robinson's position that there is a difference between an appeal from a bankruptcy court to a district court and that from a district court to a court of appeals was rejected by the Ninth Circuit in its decision of In re Bailac, 694 F.2d 625 (9th cir. 1982).

V. THIS COURT'S DECISION IN ROGERS V. MISSOURI PACIFIC RAILROAD CO., 352 U.S. 518 (1957), PERMITS A GRANT OF CERTIORARI TO DETERMINE WHETHER A FEDERAL STATUTE HAS BEEN INTERPRETED CONTRARY TO CONGRESSIONAL INTENT BY A CIRCUIT COURT.

Supreme Court Rule 10.1 allows certiorari to determine important questions of federal law. There is no more important issue in bankruptcy law than the jurisdiction of a bankruptcy court in the sale of bankruptcy assets. Robinson (Brief, 21-23) does not address the issue of a bankruptcy court's jurisdiction but phrases his argument in terms that the Bankruptcy Court properly used its

discretion in selecting Robinson's contract[6]. Neither the RTC nor Robinson address the issue of whether the Tenth Circuit's decision is contrary to Congressional intent (Writ, 12), which, under Rogers, permits this Court to grant certiorari.

Robinson, in his argument, confirms the position of Petitioner that the Bankruptcy Court performed an impermissible administrative act (Rob-Br, 21):

> Had the Debtor requested that the bankruptcy court make a choice between G-K and Robinson, this may have been an impermissible administrative act;. . .

This is exactly what the Bankruptcy Court did at the request of the Debtor in its application for approval of sale:

> WHEREFORE, Debtor prays for an order of this court allowing Debtor to sell the aforesaid real property for no less than $5.5 million to either G-K or Forrest L. Robinson, as this court may direct, . . .

This Court should determine whether the Tenth Circuit's decision conflicts with Congressional intent on jurisdiction as expressed in the legislative history of the Bankruptcy Reform Act of 1978.

VI. PETITIONER'S RIGHT TO PRIOR NOTICE AND A HEARING UNDER THE DUE-PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AS STATED IN MULLANE V. CENTRAL HANOVER BANK & TRUST COMPANY, 339 U.S. 306 (1950), CANNOT BE ELIMINATED BY ROBINSON'S AGREEMENT WITH THE DEBTOR.

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[6]Robinson argues that his contract was more advantageous because of a $50,000.00 deposit (Rob-Br, 6). Robinson's 'deposit' consisted of a $5,000.00 cash deposit which was refundable and contingent upon approval and $45,000.00 that was paid after approval. Petitioner provided a $250,000.00 letter of credit, at the time of execution, to Debtor.

Robinson cites no authority (Rob-Br, 23-25) that Petitioner's right to prior notice, as stated in Mullane, Id., is satisfied by a clause giving Robinson the 'right' to assign his contract with the Debtor. Robinson's 'right' directly conflicts with Bankruptcy Rule 2002 that the debtor provide notice of the transaction being presented to the bankruptcy court.

The RTC (RTC-Br, 8) erroneously states that if Petitioner was deprived of due process by inadequate notice it is not a basis for reversing the judgment of the Court of Appeals. The Debtor, by failing to provide adequate notice of the proceedings in the Bankruptcy Court on September 10, 1990 (Writ, App. 12), violated Petitioner's right of due process under the Fifth Amendment which renders the Bankruptcy Court's order void. In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir., 1985).

Robinson's argument that Petitioner is seeking two trials on the issue of his good faith purchaser status borders on being frivolous. No testimony or documentary evidence was introduced at the hearing on September 10, 1990, on the issue of good faith purchaser status. On remand, the Bankruptcy Court refused to receive testimony or documentary evidence on the issue of Robinson's collusion. Petitioner did not receive one hearing on the issue of good faith purchaser status with complete disclosure and never received a hearing upon which there was evidence or testimony on the issues concerned with good faith purchaser status (see footnotes 1 and 2) as the Bankruptcy Court entered its finding based upon the record of September 10, 1990 (Writ, App. 9, 12).

Robinson, without citing authority, argues (Rob-Br, 25) that G-K could not conduct discovery under Bankruptcy Rule 2004 regarding Robinson's collusion with the Debtor's general partner as Petitioner is not a "party in interest" (Brief, 25).[7] G-K, as a

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[7]Robinson's argument is inconsistent as on page 23 he states that "G-K and all other interested parties. . ." (Brief, 23).

prospective bidder, is a party in interest and is entitled to conduct discovery under Bankruptcy Rule 2004. In re Summit Corp., 891 F.2d 1 (1st Cir., 1989).

VII. THIS COURT'S DECISION IN LOUIS V. NATIONAL BANK, 364 U.S. 603, 706 (1961), THAT A PARTY SHOULD NOT RECEIVE A WINDFALL BY THE HAPPENSTANCE OF BANKRUPTCY IS NOT LIMITED TO UNSECURED CREDITORS.

Robinson seeks to distinguish the Tenth Circuit's decision from Louis on the basis that the issue of enriching unsecured creditors does not exist in the Tenth Circuit's decision. The principle established by this Court in Louis is not limited to unsecured creditors but to protect all parties from having their state property rights infringed because of the happenstance of bankruptcy. The breadth of the Louis decision is seen by its citing in Butner v. United States, supra, which involved a secured creditor. The court noted in Butner that this includes a reference to state law as it relates to ownership interests. Butner, Id. at 55. Robinson received a windfall by the Bankruptcy Court applying a federal common law of equity rather than Kansas real property standard of good faith purchaser.

CONCLUSION

On account of the importance of the federal questions raised and asserted conflicts in the circuits, United Brotherhood v. United States, 330 U.S. 395, 400 (1947), and reasons stated herein, Petitioner prays that a Writ of Certiorari should be granted to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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